



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL CASE NO. 122 OF 2012**

**COAST BRAKES & CLUTCH LTD ..... PLAINTIFF**

**V E R S U S**

**1. MUSLIM ASSOCIATION MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**2. MURPHY MERCHANTS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendant has raised a Preliminary Objection to the Plaintiff's application dated 21<sup>st</sup> November, 2012 for stay pending appeal which appeal is against this Court's decision of 8<sup>th</sup> November 2012.
2. The Plaintiff by its plaint alleges that the Defendants gave it notice dated 20<sup>th</sup> November 2011 requiring an increase of rent over the Defendants property **Mbsa/Block XVI/11** where the Plaintiff is a tenant.
3. By that plaint the Plaintiff stated that it had intended to seek leave of Business Premises Rent Tribunal (BPRT) to file a reference against that notice as provided under The Landlord and Tenant (Shops, Hotel & Catering Establishments) Act Cap 301.
4. The Plaintiff filed an interlocutory application by way of Notice of Motion dated 22<sup>nd</sup> June 2012 seeking to restrain the Defendant from terminating its tenancy and restraining from evicting it from the premises. That Notice of Motion was dismissed by a Ruling of this Court of 8<sup>th</sup> November 2012. The Plaintiff now intends to file an appeal to the Court of Appeal against that dismissal and in that regard filed a Notice of Appeal on 13<sup>th</sup> November 2012.
5. The Plaintiff by Notice of Motion dated 21<sup>st</sup> November 2012 seeks stay of execution pending appeal. It is when that application came up for hearing that the Defendants raised their Preliminary Objection.

6. The Defendants Preliminary Objection is in the following terms-

***“TAKE NOTICE that the Respondents shall be raising a Preliminary Objection at the hearing of the Appellant’s application dated 21<sup>st</sup> November 2012 on the grounds no appeal lies to the Court of Appeal under Section 15(4) of Cap 301. The alleged appeal to the Court of Appeal is bad in Law and an abuse of the Court process, the same be dismissed with costs. This Honourable Court lacks the jurisdiction to grant the orders sought.”***

7. Section 15(4) of Cap 301 is the Section that relates to appeals from BPRT's determination. Those appeals are filed in the High Court. The proviso of that Section provides-

***“Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.”***

8. The Preliminary Objection as stated in the case **MUKHISA BISCUIT MANUFACTURING CO. LTD -VS- WESTEND DISTRIBUTORS LTD [1969]E.A. 696** is-

***“... 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.”***

9. In support of the Preliminary Objection learned Counsel for the Defendants submitted that since the genesis of the matter was from the Tribunal and it related to the decision of the BPRT's chair the Plaintiff is barred by Section 15(4) of Cap 301 from filing an appeal in the Court of Appeal.

10. The Plaintiff in opposition stated that the Preliminary Objection is misconceived because this suit did not originate from BPRT and that Section 15 does not apply.

11. As stated in the case of **MUKHISA BISCUIT** (supra) for a Preliminary Objection to succeed it has to be based on agreed facts. A Preliminary Objection should not require the Court to ascertain such facts, or to do a fact finding exercise.

12. The Plaintiff’s contention and indeed on the face of it is correct is that this suit is not the subject of an appeal from a determination of the BPRT. The Defendant on the other hand contends that its origins are from the BPRT and is therefore caught by Section 15(4).

13. Those two contrary positions of the parties already remove the matter from being suitable for a Preliminary Objection. It is for that reason that the Preliminary Objection is dismissed with costs to the Plaintiff.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October, 2013.**

**MARY KASANGO**

**JUDGE**

