



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 68 OF 2015**

**HOPE KAFUNZIA T/A PROVIDENCE PHARMACEUTICALS**

**LIMITED.....APPELLANT**

**VERSUS**

**LLOYD MASIKA LIMITED .....1<sup>ST</sup> RESPONDENT**

**BENJAMIN IMALINGAT.....2<sup>ND</sup> RESPONDENT**

**RULING**

On 28<sup>th</sup> January, 2015, the appellant filed an application by way of Notice of Motion of the same date at the Business Premises Rent Tribunal(hereinafter referred as “the tribunal”) seeking the following orders:

1. That the honourable tribunal be pleased to compel the interested party(the 2<sup>nd</sup> respondent herein) to co-sign a Bank Cheque for Kshs. 524,147/- drawn on Barclays Bank of Kenya, Hurlingham Branch A/C No. 2022260378 being the outstanding rent payments owed to the respondent/landlord(the 1<sup>st</sup> respondent herein) and a further cheque for Kshs.53,000/- drawn on the same account being the costs of the attachment owed to Valley Auctioneers.
2. That the honourable tribunal be pleased to stay the intended attachment and public auction of movable property in the possession of Valley Auctioneers as described in the Schedule of the Attachment Form dated 13<sup>th</sup> day of January, 2015 pending the hearing and determination of Civil Suit No. 1734 of 2014 in the Chief Magistrate’s Court at Nairobi.
3. That there be unconditional release of the goods attached by Valley Auctioneers.
4. That the reference be set down for hearing forthwith and proceeds on its merits.
5. That the costs of the application be in the cause.

The appellant’s application was opposed by the respondents herein. The tribunal heard the application and dismissed the same on 31<sup>st</sup> July, 2015. The appellant was dissatisfied with the decision of the tribunal and filed the present appeal against the same on 13<sup>th</sup> August, 2015. The appellant has challenged the decision of the tribunal on several grounds which are set down on her memorandum of appeal dated 12<sup>th</sup> August, 2015. The appeal has not been admitted pursuant to the provisions of section 79B of the Civil Procedure Act, Chapter 21 Laws of Kenya. Together with the memorandum of appeal, the appellant filed an application by way of Chamber Summons dated 12<sup>th</sup> August, 2015 seeking a stay of the said decision of the tribunal.

The appellant’s application for stay of execution was opposed by the respondents. The 2<sup>nd</sup> respondent opposed the application through a Notice of Preliminary Objection dated 27<sup>th</sup> August, 2015 while the 1<sup>st</sup> respondent opposed the application through a Notice of Preliminary Objection dated 21<sup>st</sup> October, 2015. It is these two preliminary objections which are the subject of this ruling. The 1<sup>st</sup> respondent objected to the appellant’s application on the following grounds:

1. That the appellant has no *locus standi* to institute and prosecute the present appeal.
2. That the application and the appeal have been instituted without a lawful resolution and/or authority of Providence Pharmaceuticals Limited.
3. That the appellant, Hope Kafunzia has no authority to sue in the name of Providence Pharmaceuticals Limited which is a separate

and distinct person.

4. That the tenant in the premises in dispute is Providence Pharmaceuticals Limited and not Hope Kafunzia and that the said Hope Kafunzia does not trade as Providence Pharmaceuticals Limited.
5. That the appeal is intended to deny the 1<sup>st</sup> respondent a return on its investment.
6. That the appeal is not arguable and has no chances of success.
7. That the appeal is incurably defective and is an abuse of the process of the court.

On his part, the 2<sup>nd</sup> respondent objected to the application and the appeal on the following grounds:

1. The appellant has no *locus standi* to institute the appeal.
2. The appellant/applicant Hope Kafunzia cannot trade as Providence Pharmaceuticals Limited which is a limited liability company and a separate and distinct legal entity.
3. The appellant has not been authorized by Providence Pharmaceuticals Limited to institute the present appeal on its behalf.
4. That the court has no jurisdiction to determine the appeal as it emanates from a dispute over the management of the affairs of a company.
5. The reliefs sought by the appellant are not available to her.
6. The application is an abuse of the process of the court.

The respondents' preliminary objections were heard by way of written submissions. The 1<sup>st</sup> respondent filed its submissions on 21<sup>st</sup> October, 2015. The 2<sup>nd</sup> respondent filed its submissions on 1<sup>st</sup> October, 2015 while the appellant respondent filed her submissions on 20<sup>th</sup> November, 2015. I have considered the respondents' preliminary objections. I have also considered the submissions that were filed by respective advocates for the parties. I am of the view that these objections are misconceived and must fail for a number of reasons. Order 51 Rule 14(1) of the Civil Procedure Rules provides that any respondent who wishes to oppose any application may file any one or a combination of the following; a notice of preliminary objection; and/or a replying affidavit; and/or a statement of grounds of opposition. In this case, the respondents chose to oppose the appellant's application by way of preliminary objections.

In the case of, Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 others (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696*.

‘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 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 exercise of judicial discretion’.”

In the case of Oraro vs. Mbaja [2005]1KLR141, it was held that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

What is before this court is an appeal from the tribunal. It is not an ordinary suit. The case before the tribunal was instituted by the appellant herein who described herself as Hope Kafunzia t/a Providence Pharmaceuticals Limited. The appellant's case was heard and determined by the tribunal. The appellant was aggrieved with the decision of the tribunal. Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 Laws of Kenya provides that a party to a reference who is aggrieved with the decision of the tribunal has a right to appeal to the Environment and Land Court. What this means is that the appellant had a right of appeal to this court. As I have mentioned earlier, the appellant's appeal has not been admitted. The court has not received and reviewed the tribunal's case file. The appellant has also not prepared and filed a record of appeal. The court has not analyzed the appeal in detail to be able to express an opinion whether the appeal should be rejected summarily or not.

I have at the beginning of this ruling set out the various objections that have been raised by the respondents to the appellant's appeal and

application before the court. I am of the opinion that most of the objections raised by the respondents go to the merit of the appeal. I am of the view that such objections can only be raised after the admission of the appeal and before or at the hearing of the appeal. It would be premature for the court to determine the merit of the appeal at this stage. At this stage, the respondents should have limited their objections to the application for stay. The objections which the respondents have directed at the stay application are generally worded and do not qualify as preliminary objections strictly so called. As I have stated above, the appellant brought the suit at the tribunal as Hope Kafunzia t/a Providence Pharmaceuticals Limited. She lost the case and has preferred an appeal. The appeal has been brought in the same name.

Whether or not the appellant had the authority of Providence Pharmaceuticals Limited to institute the tribunal case on its behalf was not raised before the tribunal for determination. The issue has been raised for the first time before this court by way of preliminary objections. In addition to the fact that the issue goes to the merit of the appeal and can only be determined after the admission of the appeal, the determination of the issue would require evidence and as such cannot be determined as a preliminary objection. The respondents have also raised the issue of the jurisdiction of this court to entertain the appeal. The 2<sup>nd</sup> respondent has contended that the dispute before the tribunal concerned the management of the affairs of the company, Providence Pharmaceuticals Limited and as such an appeal does not lie to this court. Whether or not the dispute before the tribunal concerned the management of the said company cannot be determined on a preliminary objection. Again as I have pointed out earlier, all appeals from the tribunal are to be made to this court. I wonder where else the appellant was expected to file her appeal.

For the foregoing reasons, it is my finding that the objections raised by the respondents are premature and most of them are wrongly taken as preliminary objections. The 1<sup>st</sup> respondent's preliminary objection dated 21<sup>st</sup> October, 2015 and the 2<sup>nd</sup> respondent's Notice of Preliminary Objection dated 27<sup>th</sup> August, 2015 have no merit. The same are hereby dismissed. The costs of the two objections shall be in the cause.

**Delivered and Signed at Nairobi this 8<sup>th</sup> day of March 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

No appearance for the Appellant

Mr. Akwabi holding brief for Mr. Ochieng for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

Catherine Court Assistant