



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 4640 OF 1988

**KENYA NATIONAL CAPITAL CORPORATION.....
PLAINTIFF**

-Vs-

EASTLAND THEATRES LIMITED.....1ST DEFENDANT

JAMES SAMUEL KINYANJUI2ND DEFENDANT

ANNE NJERI KINYANJUI3RD DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 20th May 2014 filed by the Defendants/Applicants Under Order 42 Rule 6(1)(2); Order 51 Rule 1 of the Civil Procedure Rule, and Sections 1A 1B and 3A of the Civil Procedure Act. The application seeks as substantial prayer that there be a stay of execution of the decree herein pending appeal.
2. The application is supported by Affidavit of **JAMES SAMUEL KINYANJUI** who is the second Defendant. The said Affidavit dated 20th May 2014 was filed in court on the same day.
3. In opposing the application the Plaintiff filed Grounds of Opposition on 27th May 2014 and also a Replying Affidavit dated 27th May 2014 sworn by **MICHI KIRIMI**, the counsel for the Plaintiff. The Plaintiff/Respondent has raised eleven (11) grounds of opposition for the application.
4. The brief history of the application is that on 30th October 2009 judgement was entered herein in favour of the Plaintiff/Respondent. By a Notice of Appeal lodged before this court on 11th November 2009 the Applicant gave notice of intention to appeal the judgement, and sought from the court copies of the proceedings which were not ready until recently. (See them in the file). By an application dated 11th March 2013, the Applicant sought Orders from this court against proceedings of the Notice to Show Cause as to why they should not be arrested and jailed for failure to pay the said debt. The applicants also prayed for stay of execution pending the said appeal. Those prayers were denied by a ruling of this court delivered on 6th December 2013. The Defendants/Applicants have now come up with this application for stay of execution pending appeal.
5. I have looked at the Grounds of Opposition filed by the Plaintiff/Respondent and their Replying Affidavit. Among the said grounds is that the current application is resjudicate having been considered by court in the Applicant's application dated 11th March 2013 and dismissed vide this

court's ruling of 6th December 2013.

6. The Applicant has denied this, submitting that the principle of resjudicate applies to a matter which has been directly and substantially in issue in previous proceedings between the same parties and a decision in respect thereof rendered. It is submitted for the Applicant that the present application and the previous one dated 11th March 2013 are totally different in substance, and that the former application was brought substantively under the provisions of the Constitution of Kenya alleging violation of the Fundamental Rights and Freedom of the individual, while in this application the prayer is for stay pending appeal.
7. I have no intention of writing a long ruling in this matter. The Applicant's Notice of Motion dated 11th March 2013 was heard by myself and I delivered a ruling on 6th December 2013. The only issue I wish to raise so as to dispose off this application is whether or not the current application is resjudicate. In order to do this I must go back to the prayers in the Notice of Motion dated 11th March 2013. Among the other provisions of the law, that motion was filed under Order 42 Rule 6, Order 22 Rule 18, Order 5 Rule 1. Order 42 Rule 6 of the Civil Procedure Rules specifically deals with circumstances under which a court can grant a stay of execution pending appeal. Prayer 5 of that application was that **“???*there be a stay of execution of the decree herein pending appeal*”**. Ground number 8 of the application supported the prayer for stay pending appeal.
8. It is therefore clear that the application had prayed for a stay of execution pending appeal in the Notice of Motion dated 11th March 2013. But if there is any doubt, it should be erased by my ruling delivered on 6th December 2013. At paragraph 28 of the said ruling I considered the principles that Section has set for the grant of stay of execution pending appeal. In paragraphs 29 and 30 of the said ruling I analysed the Applicant's situation. At paragraph 31 I stated that the Applicant had not met the conditions set out under Order 42 Rule 6 to warrant them a stay of execution, and at paragraph 32 of the said ruling I dismissed with costs the said Notice of Motion.
9. I do not need to add that I am satisfied that the present application is resjudicate, and clearly an abuse of the process of this court.
10. The Notice of Motion application dated 20th May 2014 is herewith dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

Present:-

M/s. Gitau holding Tiego for Defendant/Applicant

Makori for Plaintiff/Respondent

Teresia – Court clerk