



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**  
**CIVIL SUIT (ELC) NO.448 OF 2010**

**FILM STUDIOS LTD.....PLAINTIFF**

**VERSUS**

**ALICE KALYA(Sued in her capacity as the  
chairperson of the Agricultural Society of**

**Kenya.....1<sup>ST</sup> DEFENDANT**

**J. B. NTHUKU.....**

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

**IBRAHIM MANYARA.....**

**.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. I have two applications before me. The first application is the one dated 23<sup>rd</sup> September, 2010, which was brought by Film Studios Kenya Limited who is the plaintiff in this suit. The plaintiff is seeking inter alia orders of temporary injunction restraining the defendants, their servants or agents from interfering with the plaintiff’s right to quiet possession over LR No.9141 (hereinafter referred to as the demised premises), pending the hearing and determination of the suit which the plaintiff has filed against the defendants.

2. The plaintiff further seeks a temporary injunction restraining the defendants, their servants or agents from in any way preventing the plaintiff from proceeding with construction of lighting stores, on the demised premises pending the hearing and determination of the suit.

3. The application is anchored on a lease agreement entered into by the plaintiff and the defendants in regard to the demised premises. The plaintiff contends that the defendants are maliciously and unreasonably preventing the plaintiff from continuing with construction of lighting stores on the demised premises. The plaintiff maintains that the lease agreement does not require the plaintiff to obtain the consent of the defendants before engaging in the construction. The plaintiff explains that it has obtained the approval of the City Council of Nairobi for the construction, and has already spent about Kshs.3 Million in the construction. The plaintiff therefore stands to lose a very valuable investment if the orders sought are not granted.

4. The defendants in this case are Alice Kalya (sued in her capacity as the chairperson of the Agricultural

Society of Kenya), J.B. Nthuku and Ibrahim Manyara. They are the applicants in the second application which is before me. The application which is dated 7<sup>th</sup> October, 2010, has been brought under Section 6 of the Arbitration Act 1995, Rule 2 of the Arbitration Rules 1997, and Sections 1A, 1B & 3A of the former Civil Procedure Act Cap 21 (now repealed). The defendants seek an order of stay of all proceedings herein pending arbitration, and a further order that the dispute between the parties herein be referred to arbitration. The dispute between the defendants and the plaintiff has its roots in a lease agreement which was entered into by the parties in regard to 2 acres of LR No.9141 (hereinafter referred to as the suit property).

5. Charles Simpson, a director of the plaintiff, swore an affidavit on 23<sup>rd</sup> September, 2010 in support of the plaintiff's application. Bertram Muthoka, the Chief Executive Officer of the Agricultural Society of Kenya, also swore an affidavit in support of the defendants' application. From the two affidavits and the annexures thereto, it is common ground that the plaintiff and the defendants entered into a lease agreement in respect of two acres curved out of LR No.9141 and that in fencing the two acres, the plaintiff also included a portion measuring 0.65 acres (hereinafter referred to as portion C). It is not disputed that portion C did not form part of the original lease. It is not disputed that the construction carried out by the plaintiff is on portion C.

6. The plaintiff's contention is that the parties entered into a subsequent agreement for the plaintiff to use portion C subject to payment of an additional rent, and that an addendum to the original lease to reflect the additional space was to be prepared. The plaintiff maintains that it has been paying rent in accordance with that agreement. The defendants are however now interfering with the plaintiff's use of portion C by interfering with the construction.

7. The defendants on their part contend that the plaintiff is in breach of the express terms of the lease by failing to pay for the reviewed rent as provided in the lease and also commencing construction without first obtaining the consent of the defendants. The plaintiff contends that clause 4(d) of the lease agreement provides that any dispute between the parties or claims for compensation regarding the lease which are not agreed upon by the parties shall be referred to arbitration in accordance with the provisions of the Arbitration Act. The defendants object to the plaintiff's suit, contending that it is premature as arbitration has not been pursued. The defendants therefore urge the court to stay the proceedings and refer the suit to arbitration.

8. Counsel for the plaintiff has endeavored to draw a distinction between specific performance of the registered lease agreement and specific performance of the agreement to grant a lease in respect of portion C. It is contended that portion C not being part of the registered lease, is not covered by those terms. It is further argued that since there is no written lease in respect of portion C there is no agreement for arbitration over any dispute concerning portion C. It is further submitted that the original lease agreement gave the plaintiff the right to construct on the demised premises. Therefore, even if it was to be accepted that portion C forms part of the demise premises, then the plaintiff would have the right to construct on portion C.

9. Having considered these contending arguments, I find that although portion C was not part of the original lease, the parties did agree that portion C would be added to the lease. This is evident from the correspondences exchanged and the conduct of the parties. Therefore, the issue here is not whether portion C has been leased to the plaintiff but whether in accordance with the terms of the agreement between the parties the plaintiff is entitled to proceed with its construction over portion C. It is clear to me that the parties' intention was that portion C should be added to the original lease as an addendum. This means that the terms of the lease in regard to portion C were the terms of the original lease. That being the position, the plaintiff is bound by the terms of the original lease Clause 4(d) of which provides for all questions in dispute between the parties to be referred to arbitration.

10. In the circumstances, I allow the defendants' application, stay these proceedings, and direct that the parties shall refer their dispute for arbitration in accordance with Clause 4(d) of the lease agreement.

**Dated and delivered this 11<sup>th</sup> day of February, 2011**

**H. M. OKWENGU**  
**JUDGE**

In the presence of: -  
Mrs Shaw & Bwongeri for the plaintiff  
Advocate for the defendants absent  
B. Kosgei - Court clerk