



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NUMBER 291 OF 2011**

**MOVIES FOUR YOU LIMITED. ....PLAINTIFF**

**VERSUS**

**INDUSTRIAL & COMMERCIAL  
DEVELOPMENT CORPORATION.....DEFENDANT**

**R U L I N G**

The plaintiff filed a plaint on 27<sup>th</sup> July, 2011, as a fast track case. On the same date, they filed a Notice of Motion under Order 40 rule 1 & 2 of the Civil Procedure Rules. The prayers in the application are as follows: -

- 1. That this application be certified as urgent and fit to be heard forthwith and exp parte in the first instance.***
- 2. That the defendant, its agents, servant or any other person acting on the defendant's instructions be restrained by an interim injunction from entering, trespassing, taking possession or in any other way interfering with the plaintiff's quiet possession of his leased premises on plot No. L.R. 209/7409 situated along Aga Khan Walk Nairobi until the hearing and determination of the suit herein.***
- 3. Costs of this application be borne by the defendant.***

On 23<sup>rd</sup> August 2011, the defendant entered appearance. They did not file a response to this application. However, on 1<sup>st</sup> September, 2011 they filed a Chamber Summons under section 6 of the Arbitration Act No. 4 of 1995 and Rule 2 of the Arbitration Rules of 1997 seeking for a stay of proceedings to have the matter referred to Arbitration for the resolution of the dispute.

When the Notice of Motion filed on 27<sup>th</sup> July 2011 came up for hearing as scheduled on 19<sup>th</sup> September 2011, counsel for the defendant asked the court to hear his client's Chamber Summons instead of the Notice of Motion. Since the Chamber Summons application did not have a hearing date and the Notice of Motion had a prior specific hearing date, the court ordered that the Notice of Motion be heard. The Notice of Motion was heard and both Mr. Kimani for the plaintiff and Mr. Onguto for the defendants addressed the court.

The Notice of Motion has grounds on the face of the application. It also was filed with a supporting

affidavit said to be sworn by Albert Karunguru Muriithi described as Managing Director of the plaintiff. The affidavit was actually not dated. Therefore, in my view, it cannot be said to have been sworn.

The application is opposed on technical grounds, based on the provisions of the Arbitration Act. Counsel for the defendant has submitted that this court does not have jurisdiction to entertain this suit as well as the Notice of Motion application as a request for reference to arbitration has been filed through the Chamber Summons. I do not agree with that preposition. However, as the affidavit in support of the Notice of Motion application was not dated, there are no facts which this court can rely on to consider the Notice of Motion on its merits.

The application, not having any facts or evidence to support it cannot stand. On that basis the application will have to be dismissed, and I will dismiss the same.

Consequently, the Notice of Motion is hereby dismissed, as it is incurably defective. It has no facts on which the court can consider it on merits. I however order that the costs of the application will be in the cause, as the Notice of Motion is an application within the main suit which is still pending.

It is so ordered

Dated and delivered at Nairobi this 21st day of September 2011.

.....  
**GEORGE DULU**  
**JUDGE**

**In the Presence of**

Mr. Kimani for plaintiff

Mr. Onguto for defendant

C Muendo – court clerk