



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 778 of 2002**

**ENGINEERING MANUFACTURERS LIMITED.....PLAINTIFF**

**VERSUS**

**MARSHALL-FOWLER (ENGINEERS) LIMITED.....DEFENDANTS**

**RULING**

The Chambers Summons dated 30<sup>th</sup> of May 2006 is brought by the plaintiff. The same is brought under order XXXVI Rules 8A and 12 of Civil Procedure Rules. The application seeks that this court would issue directions for the conduct of this Originating Summons. The application is supported by an affidavit of the Managing Director of the plaintiffs company. In his affidavit he states that it would be reasonable and expedient to proceed with the hearing of the originating summons on the basis of the affidavits that are already on record. That the supporting affidavit has annexed documents which are in issue especially contractual agreement and arbitral clauses. That the present action seeks the court determination on whether on the agreements true construction the applicant and the defendant agreed to refer the dispute to arbitration. The action also seeks a determination whether dispute liable for arbitration has a reason. When the matter came up for hearing the defendants advocate objected to the application by seeking that an order be made for the cross examination of the deponent of the affidavit in support that is Terrence O'Donovan.

The defendant in opposing the order for hearing by affidavit evidence had not filed an affidavit in response to the application showing by affidavit evidence why it is necessary for the court to give an order for cross examination of the deponent of the affidavit. Such an affidavit would have assisted this court to make a determination on whether to order the cross examination. The defendant did not state that the matters which he wishes to cross examine on are incapable of being controverted on the basis of another affidavit. The court therefore rejects the request for cross examination of the deponent. The court therefore finds no reason why the orders sought by the plaintiff should not be granted as prayed. The orders that are hereby granted are as follows:-

- 1) That this case shall proceed by way of affidavit evidence on record.**
- 2) That this case shall be heard in Nairobi for one day.**
- 3) That the costs of the chamber summons dated 30<sup>th</sup> of May 2006 shall be in the cause.**

**MARY KASANGO**

**JUDGE**

Dated and Delivered this 16<sup>th</sup> day of November 2006

**MARY KASANGO**

**JUDGE**