Case Number:	Civil Suit No 43 of 2004
Date Delivered:	29 Oct 2004
Case Class:	Civil
Court:	High Court at Kericho
Case Action:	-
Judge:	Luka Kiprotich Kimaru
Citation:	Mau Tea Multi-Purpose Co-operative Society Ltd & another v Webster & another [2004] eKLR
Advocates:	Mr. Kamau for the Plaintiffs, Mr. Onyango for the Defendants
Case Summary:	Civil Procedure - application for mandatory injunction- conditions that must be fulfilled before a court can grant such injunction - affidavit - parties who may swear an affidavit on behalf of a corporation
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO. 43 OF 2004

MAU TEA MULTI-PURPOSE

CO-OPERATIVE SOCIETY LIMITED……..1ST PLAINTIFF

(Formerly Mau Tea Estate Co. Ltd.)

JAMES FINLAY (K) LTD……..……2ND PLAINTIFF

(Formerly African Highlands Produce Co. Ltd.)

VERSUS

CAROLYNE WEBSTER……..……1ST DEFENDANT

RURAL INITIATIVE PROGRAMME…..……..2ND DEFENDANT

RULING

By a Notice of Motion made under **Section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules,** the Plaintiffs have moved this Court seeking the orders of mandatory injunction directing the Defendants, their servants and or agents to immediately vacate and remove their possessions from the residential premises consisting of a bungalow, stores and garage which are situated on the land parcel number **LR No. 1676/5** and **6014** and in default of the Defendants so vacating, the Defendants be evicted therefrom under the supervision of the officer commanding station, Kericho. The grounds in support of the Application which are stated on the face of application are that the 1st Plaintiff is the absolute registered owner of the suit premises. The Plaintiffs have further stated that the 2nd Plaintiff is the management agent of the 1st Plaintiff. The Plaintiffs further state that the Defendants have been the tenants of the Plaintiffs at the suit premises. They further state that the Defendants had not paid rent for the said premises from January 2003 to date but have continued to occupy the said premises thus causing irreparable harm to the Plaintiffs.The Plaintiff further state that the lease entered between the Plaintiffs and the Defendants had expired but the 1st Defendant had refused to vacate the said premises and give vacant possession of the same to the Plaintiffs. The Application is supported by the annexed affidavit of E. K. Korir the Legal and Personnel Manager of the 1st Plaintiff. The Application is opposed. The 1st Defendant has filed a replying affidavit of opposing the Plaintiff's application.

In his submission before Court, Mr Kamau, Learned Counsel for the Plaintiffs submitted that the 1st Defendant was occupying the suit premises wrongfully. Counsel submitted that a lease agreement was entered between the Plaintiffs and the Defendants on the 1st of July 2002. The said lease for the said premises was to last for one year only. The Plaintiffs submitted that the said lease therefore expired on the 1st of July 2003. The said lease was not renewed. The Plaintiffs submitted that the Defendants had not paid any rent for the said premises since January 2003. The Plaintiffs further submitted that ever since the said lease expired, the Defendants had adamantly refused to vacate the said demised premises and had refused to give vacant possession of the said premises to the Plaintiffs. The Plaintiffs submitted that the Defendants were in wrongful occupation of the said premises and were therefore trespassers.

The Plaintiffs further argued that under the provisions of **Section 108 (b) (M) of the Indian Transfer of Property Act the Defendants** were required to yield up the demised premises upon the expiry of the lease period. The Plaintiffs further relied on **Section 108 (b) (q) of the said Act**. The Plaintiffs submitted that the Defendants were bound by the law to put the Plaintiffs back in possession of the said premises upon the expiry of the lease. The Defendants were, according to the Plaintiffs, thus in illegal occupation of the said premise. The Plaintiffs submitted that they had satisfied the required conditions set in order to be granted the orders of mandatory injunction. The Plaintiffs submitted that they had established that the Defendants did not have any legal right over the said property. The Plaintiffs had further proved that they were the registered owners and manager respectively of the said property and finally that the facts pleaded were so straight forward that the Court would come to no other decision but to grant the orders of mandatory injunction sought.

The Plaintiffs averred that the Defendants had not raised any issue in their Defence or in the replying affidavit that would in any way weaken the Plaintiff's strong case. The Plaintiffs further submitted that the Defendants had not proved that they had the lease renewed or that they had paid the requisite rent for the said premises. The Plaintiffs further submitted that the Defendants had admitted that they were in illegal occupation of the said premises from 1st of July 2004. The Plaintiffs submitted that they had locus standi to bring the suit against the Defendants to regain possession of the suit land. The Plaintiffs urged this Court to allow the Application. Mr Kamau referred this Court to various decided cases in support of the application.

Mr Onyango, Learned Counsel for the Defendants first started by submitting on what he considered to be the points of law. Learned Counsel submitted that the affidavit supporting the Plaintiff's application was incompetent and fatally defective.Mr Onyango submitted that the deponent of the further affidavit did not state in the said affidavit that he was authorised to swear the Affidavit on behalf of the Plaintiffs. The Defendants further submitted that the Plaintiffs did not have locus standi to bring the suit and application against the Defendants. Learned Counsel further submitted that the lease agreement was entered between Mau Tea Estate Ltd which was stated to be the registered owner and not Mau Tea, the 1st Plaintiff in this case. It was the Defendants submission that the two were different entities.The Defendants further submitted that the 2nd Plaintiff did not have the authority of the 1st Plaintiff to bring the suit before Court. The Defendants further submitted that they were not aware that the 2nd Defendant was managing the said property as the fact was not brought to their attention. Learned Counsel for the Defendants further submitted that the 2nd Plaintiff was therefore a stranger to the Defendants and therefore could not sue them. The Defendants further submitted that the Plaintiffs had not established the requisite conditions under which the Court may grant orders of mandatory injunction. The Defendants submitted that the Plaintiffs did not have the right to seek the said orders against the Defendants. The Defendants submitted that the lease had been verbally renewed. The Defendants further submitted that the Plaintiffs had not established a prima facie case to enable them be granted the orders sought. The Defendants referred the Court to various decided cases in support of their submissions which cases I will have the opportunity to refer to later in this ruling.

I have anxiously considered the rival arguments made by the Counsel for the Plaintiffs and the Counsel for the Defendants. I have also read the entire pleadings filed by the parties to this application. There are two issues which have come to the fore for determination by this Court. The first issue is whether the suit and the Application filed by the Plaintiffs against the Defendants is competent. The other issue for determination is whether, on the evidence on record and the submissions made, the Plaintiffs have established that they are entitled to the orders of mandatory injunction sought. On the first issue, Mr Onyango, Learned Counsel for the Defendants has argued that the Plaintiffs did not have locus standi to sue the Defendants. Learned Counsel submitted that the lease agreement dated the 1st of July 2002 was entered between "Mau Tea Estate" a limited liability company and "Rural Initiative

Programme" a Non- Governmental Organisation. Learned Counsel further submitted that the 2nd Plaintiff was therefore a stranger to the Defendants. I have considered this argument made by the Defendants. On the 28th of June 2004, the Plaintiffs amended their Plaint. In the said amended plaint the Plaintiffs names were changed to **"Mau Tea Multipurpose Co - operative Society Ltd (Formerly Mau Tea Estate Ltd)" and "James Finlay (K) Limited (Formerly African Highlands Produce Co. Ltd)**". The said amendments were made before the pleadings were closed. Paragraph 1A of the said amended plaint gives an explanation of the change of names. The two substituted Plaintiffs have explained that they are the successors of the two former companies that had entered and witnessed the agreement respectively entered with the Defendants. I do not find merit in the submission by Learned Counsel.The Plaintiffs are proper parties to this suit and have capacity to sue the Defendants. Most probably the said submission was made in ignorance of the fact that the requisite amendments had been made by the Plaintiffs. I do therefore find that the Plaintiffs are the proper parties to this suit and further that the Plaintiffs have locus st andi to bring this suit against the Defendants.

The second aspect of the argument made by Mr Onyango is that Mr E. K. Korir, the Legal and Personnel Manager of the 2nd Plaintiff did not have the authority of the Plaintiffs to swear the affidavit in support of the Application. Mr Onyango submitted that the said Mr. E. K. Korir did not state in his affidavit that he was authorised to swear the said affidavit on behalf of the two Plaintiffs, who are limited liability companies. Mr Onyango referred this Court to two decisions of a Court of concurrent jurisdiction as this Court. The two decisions are **Microsoft Corporation –versus- Mitsumi Computer Garage Ltd. HCCC No. 810 of 2001 (Milimani) (2001) 2 E. A. 460 and Silvanos Kipraisi Tubei –versus- Kenya Commercial Finance Ltd HCCC No. 261 of 2003 (Milimani) (unreported).** I have read the two decisions. I agree with the finding of the two Courts that not anybody in a Corporation or a company may swear an affidavit in a suit even if the person deponing to the facts of the said case is extremely conversant with the facts of the case. The affidavit on behalf of a corporation has to be sworn by a recognised officer of the corporation. In the **Microsoft Corporation** Case (supra) the definition of an officer of a Corporation was defined as either a director, Manager or Secretary.

In the instant application Mr E. K. Korir has stated that he is the Legal and Personnel Manager of the 2nd Plaintiff. According to the above definition, the said Mr. E. K. Korir was thus authorised and competent to swear the said affidavit in support of the application. The quarrel that the two Courts in the above two cases had with the deponents is that the only qualification that the said deponents seemed to have possessed is that they were employees of the companies in question and further that they had stated that they were conversant with the facts of the case. The two Courts rightly held that such persons were not authorised to swear affidavits in suits filed by the companies as they were not, in law, authorised to swear such affidavits on behalf of the corporation. It is therefore evident that the submissions made by Mr Onyango that Mr E. K. Korir is not authorised to depone on an affidavit on behalf of the 2nd Plaintiff lacks merit.

Addressing the substantive application before me, it was held in The **Despina Pontikos [1975] E.A. 38** that for a Court to grant the orders of mandatory injunction, several conditions have to be fulfilled. The conditions are that it has established that by the party seeking the order that he has a strong case which the Defendant did not have a defence to. It also has to be established that an award of damages may not be adequate or assured. Further the Court will consider the conduct of the parties to the suit before grant the said order of mandatory injunction issued. Spry, the Acting President of the then Court of Appeal of East Africa (the predecessor to the Court of Appeal of Kenya) stated at page 57:

"We turn now to the substantive issue, which is w hether the mandatory injunctions ought to have been granted. We would begin by remarking that this Court has held more than once that interlocutory mandatory injunctions should be granted with reluctance and only in very special

circumstances … Mr Reynold s argued that a mandatory injunction, as a discretionary relief, should not be granted where damages would provide an adequate remedy. As a general proposition that is unquestionably correct. In the present case however there is no assurance than an awar d of damages would be effective and Mr Reynolds felt bound to concede that the prospects of the Plaintiffs recovering any damages is "very remote". It would be quite unrealistic to refuse a mandatory injunction on the ground that damages would afford a sufficient remedy, if that remedy is likely to prove illusory."

At page 59, he stated

"Finally, in deciding whether to grant an equitable relief, a Court is entitled to take into account the conduct of the parties. The Judge clearly thought that the defe ndants had been pursuing a policy of procrastination, if not of evasion. On the materials before use, we think the was fully justified."

In ***Kenya Breweries Ltd & Anor –versus- Washington Okeyo Civil Appeal No. 332 of 2000 (Nrb) (unreported***) it was held by the Court of Appeal at page 3 that:

"The test to grant a mandatory injunction or not is correctly stated in Vol. 24 Halbury's Law of England 4 th Edition para. 948 which reads: "A mandatory injunction can be granted on an interlocutory application as wel l as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be ea sily remedied, or if the Defendant attempts to steal a march on the Plaintiff… a mandatory injunction will be granted on an interlocutory application."

Also in Locabail International Finance Ltd –vs- Agroexport and others [1986] All ER 901 at page 901 it was stated: - "A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunc tion was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.

Applying the above stated principles to the present case, the Plaintiffs have stated that the Defendants were given a lease of the suit premises which lease agreement had been reduced in writing. The Plaintiffs submitted that the said lease agreement was specific as to the date of determination; the said lease agreement was for a period of one year and no more. It is the Plaintiff's case that the lease agreement entered on the 1st of July 2002 was to expire on the 1st of July 2003. There was no provision for the renewal of the said lease. On the other hand the Defendants submit that the lease over the said suit premises was verbally renewed by the parties. The Plaintiffs have further stated that the Defendants had not paid rent since January 2003 to date. It was the Plaintiff's case that apart from refusing to pay the rent, the Defendants had refused to give vacant possession of the said premises to the Plaintiffs. The Defendants on the other hand are denying that they have not paid rent, although they did not exhibit any receipt to show that they have been paying rent to the Plaintiffs.

It is the finding of this Court on the evidence on record, that the Plaintiffs have established that indeed the Defendants have not paid any rent since January 2003. I have perused the said lease

agreement which was annexed to the Plaintiff's application as annexture No. EKK1 (a). Although the said lease agreement was said to be for a period of one year, there was a provision for the renewal of the said lease according to clause 2 of the said lease agreement. It appears that since the said lease expired on the 1st of July 2003, the parties to the said lease agreement had not sat down and agreed to renew the said lease agreement for another term. The Plaintiffs insist that upon the expiry of the said lease agreement, the same was not renewed. On the other hand the Defendants have submitted that the said lease was renewed verbally.

Now, the fact that the lease was or was not renewed would not have been a important factor if the Defendants had paid rent as agreed. At is were, the Defendants have been residing in the said premises for nearly two years without paying any rent to the Plaintiffs. The raison d'etre for the Plaintiffs granting the lease of the said premises to the Defendants was so that they would benefit from their investment by being paid rent. The granting of the lease of the said suit premises to the Defendants by the Plaintiffs was not gratuitous. The Plaintiffs have annexed documents in support of their application which clearly shows that the Defendants have used all possible means to remain on the said premises without paying any rent.

The Defendants have engaged in a discernible pattern of seeking to frustrate the Plaintiffs from getting back possession of the said premises. In the circumstances of this case, it is the finding of this Court that the Plaintiffs have established a very strong case to entitle them to the grant of orders of mandatory injunction sought. The Plaintiffs have established that lease granted to the Defendants had expired. The said lease having expired, it was incumbent upon the Defendants to yield possession of the said premises to the Plaintiffs. The Plaintiffs have further established that the Defendants conduct is such that they are precluded from seeking the equitable intervention of this Court. The Defendants have refused to pay any rent since January 2003 but have insisted on staying on the said premises long after the lease had expired. The Defendants clearly do not deserve the sympathy of this Court. The Defendants have trampled on the proprietary rights of the Plaintiffs who require to be put in possession of their premises as soon as possible so that they may be in a position to recoup their investment. By refusing to pay the rent and at the same time insisting on remaining on the said premises, the Defendants are, in effect, having their cake and eating it at the same time. The Defendants are stealing a match from the Plaintiffs. So far they have not paid the rent which has been outstanding from January 2003. There is no guarantee that the Plaintiffs would be able to recover the rent in arrears of more than Kshs. 650,000/=. The prospects of such recovery appears to be remote at the present moment. It would therefore be just and equitable to grant the orders of mandatory injunction to the Plaintiffs so that they may be in a position to cut their losses.

In the premises therefore, the Plaintiffs are hereby granted the orders of mandatory injunction as prayed in the application dated the 12th of August 2004. The Defendants are hereby ordered to grant vacant possession of the premises situate at LR. No. 1676/5 and 6014 within seven (7) days from today's date. In default of the Defendants giving vacant possession of the said premises, the Plaintiffs shall be at liberty to evict the Defendants from the said premises with the assistance of the Officer Commanding Station, Kericho Police Station. The Plaintiffs shall have the costs of this application.

DATED at KERICHO this 29th day of October, 2004.

L. KIMARU

AG. JUDGE