REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 42 of 2005

BENSON MUCHIRI MUTHOKIA…….....
…….1ST PLAINTIFF

ESTHER TAPNYABII SIGILAI….....……...
…….2ND PLAINTIFF

VERSUS

KELLEN WAITHERERO GICHIMU (*Sued as the legal administrator of the estate of the late*

Elijah Thuku Muthokia and the legal guardian of

***Risper Wanjiku Thuku, Sussy Wangechi Thuku, Samuel Muthokia Njuguna*)…….**
….DEFENDANT

RULING

On the 21st of September 2005 this court granted the plaintiff's application for injunction and at page 6 of its ruling observed as follows:

"***Having carefully evaluated the facts of this case and in the light of the principles applicable for the grant of interlocutory injunction, I do find that the plaintiffs have established a prima facie case that part of the suit land was transferred to the defendant and her children under very suspicious circumstances. The plaintiffs entrusted the mutation forms to the deceased, who instead of following the instruction decided to have a portion of the said parcel of land registered in his name and that of his children. The defendant has failed to prove that the said parcel of land was lawfully transferred to her and her children."***

At page 7, this court stated that:

"***In the premises, the plaintiffs' application succeeds. The defendant by herself, her servants or agents are hereby restrained from ploughing, planting, transferring or in any other way interfering with the suit land (****and all the titles that have been subdivided therefrom****) pending the hearing and determination of the main suit. The plaintiffs shall have the costs of the application."***

By an application dated the 31st of January 2006, the defendant moved this court by a notice of motion under the provisions of **Order L rule 1, Order XXXIX rule 4, Order VI rule 13(1)(d) of the**

Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to have the said order of injunction granted discharged, varied or set aside. The defendant further sought orders to have the application filed by the plaintiffs which led to the grant of the said order of injunction struck out with costs. The grounds in support of the application are that the defendant contends that in the absence of a prayer of permanent injunction this court could not have granted the said order prayed by the plaintiffs. Further, the defendant is of the view that the maintenance of the said order in the absence of a proper application for permanent injunction would be an abuse of the due process of the court as it would amount to this court maintaining an order which was granted pursuant to non-existent pleadings. The defendant further contends that she would suffer irreparable harm as she has been unable to tend her farm after the grant of the said order which is her only source of livelihood. The application is supported by the affidavit of the defendant. She has further sworn a supplementary affidavit in further support of her application. Benson Muchiri, the 1st plaintiff has filed a replying affidavit opposing the said application.

At the hearing of the application, Mr Akangó Learned Counsel for the defendant submitted that the plaintiffs had applied for an order of temporary injunction but were instead granted an order of permanent injunction. He submitted that the order which was granted by this court was irregularly granted in that the conditions for the grant of injunction were not satisfied; the property in dispute was not specified neither was it stated that the said property was at risk of dissipation, disposal or that the defendant intended to alienate the property. He contended that the application for injunction was granted in a vacuum. He submitted that an injunction being an equitable remedy could only be granted where the applicant was prepared to be equitable to the respondent. He argued that an injunction was meant to preserve the suit land and not to frustrate the party against whom the order has been obtained. It was his submission that the said order issued by this court was oppressive to the respondent and this court should therefore exercise its discretion and set aside the said order issued.

Miss Njoroge learned counsel for the plaintiffs opposed the application. She submitted that no grounds had been placed before this court to make this court set aside the said order issued. She submitted that this court had correctly arrived at the decision that the manner in which the defendant obtained the titles of part of the suit lands was suspicious. She took issue with the fact that the defendant was re-arguing the application when the court has already granted the injunction which preserved the *status quo*. She argued that the application currently before court was an afterthought and was meant to persuade this court to exercise mercy on the defendant. She was of the view that the application was meant to frustrate the orders issued by this court pending the hearing and determination of the main suit. She urged this court to disallow the application.

I have carefully read the pleadings filed by the parties in this application. I have also carefully considered the rival submissions that were made by the counsel for the defendant and the counsel for the plaintiffs. The issue for determination by this court is whether the defendant has established a case to warrant this court to set aside or vary the order of injunction that was issued to restrain the defendant in respect of the suit parcel of land. Mr Akangó has argued that this court ought not to have issued the order of injunction that it did because it was in the nature of a permanent injunction whereas the plaintiffs prayed for an order of temporary injunction. He further submitted that there were no pleadings by the plaintiffs which supported the findings of this court as regard the order of injunction that was ultimately issued. The plaintiffs have responded by stating that the defendant is seeking to re-argue the application for injunction which had been granted by this court by appealing for the exercise of mercy by this court.

I have evaluated the facts in issue in this case and the applicable law. Whereas it is not disputed that the defendant has a right to challenge the decision of this court, the defendant can only do so within certain legal parameters. If the defendant was aggrieved by the decision of this court, she was at liberty to file an appeal to the Court of Appeal against the said decision or if the grounds upon which the defendant is challenging this court's decision falls within the ambit of the provisions of **Order XLIV of the Civil Procedure Rules**, then the defendant should have made an appropriate application to review the said decision of this court. It is however not open to the defendant to challenge the decision of this court by seeking to re-argue the application for injunction where a ruling has already been delivered.

This court is of the considered opinion that the defendant being of the view that she did not argue the

initial application competently before this court, then, having appointed an advocate to act for her, she should be given another opportunity to again ventilate her case before this court. Unfortunately, in doing so the defendant abused the due process of this court. Having made the decision in respect for the application filed by the plaintiffs, this court became *functus officio* as regard the said application. The parties to the said application cannot re-argue the application before this court. The defendant cleverly purported to raise issues of law where in actual sense the defendant was seeking to have a second bite of the cherry. That cannot be. If the defendant was dissatisfied with the decision of this court she ought to have appealed to the Court of Appeal and not '*appeal'* to this court.

From the aforegoing, it is clear that this court is not impressed with the application filed by the defendant because the issues raised therein are issues which ought to have been raised before an appellate court and not the court which heard the application in the first instance. The application before me is not in the nature of an application for review and therefore I cannot look into the decision of this court delivered on the 21st of September 2005 with a view of varying it or setting it aside.

The application lacks merit and in my view is a backdoor attempt by the defendant to re-argue an application which this court has rendered its decision. The said application is therefore dismissed with costs to the plaintiffs.

DATED at NAKURU this 19th day of May 2006.

L. KIMARU

JUDGE