



REPUBLIC OF KENYA



**In re Estate of Valent Wamalwa Mutoro (Deceased) (Succession Appeal  
E009 of 2023) [2025] KEHC 7148 (KLR) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7148 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION APPEAL E009 OF 2023**

**REA OUGO, J**

**MAY 27, 2025**

**IN THE MATTER OF THE ESTATE OF VALENT WAMALWA MUTORO (DECEASED)**

**BETWEEN**

**MOSES WEKESA WAMALWA ..... 1<sup>ST</sup> APPELLANT**

**BENEDICT N. MUTORO ..... 2<sup>ND</sup> APPELLANT**

**ALEX JUMA WAMALWA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**FERISTA WAMALWA MUTORO ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTANUS WAMALWA MUTORO ..... 2<sup>ND</sup> RESPONDENT**

**CHRISPINUS ALBERT JUMA MUTORO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Chrispinus Albert Juma Mutoro, the third respondent/ applicant, alleges that the appellants herein are leasing portions of land that constitute the estate of the deceased. He has moved this court through an application dated the 7<sup>th</sup> of April 2024 seeking the following orders;
  - i. Spent
  - ii. That pending the hearing and determination of the appeal, this court do issue ex-parte temporary injunction order barring and restraining the appellants sons of the deceased and lessees by themselves, their agents, servants jointly and severally from entering, cultivating, surveying, transferring, disposing selling alienating and otherwise intermeddling with the estate of the deceased.
  - iii. That this Honourable Court be pleased to issue any other such orders as it may deem fit and just in the circumstances of this application.



2. The applicant filed an affidavit dated 7.4. 2025 in which he avers that the respondents are the administrators of the deceased's estate. They initiated objection proceedings in the lower court, and the court delivered a ruling on the 9<sup>th</sup> of November, 2023, which is the subject of the appeal. In March 2025, the appellants and some of the deceased's sons began leasing fractions of the estate of the deceased in the pendency of the appeal and said actions undermine the court process and constitute contempt of court. An order of temporary injunction is necessary to ensure the diligent preservation of the estate of the deceased Valent Wamalwa Mutoro, pending the hearing and determination of the Appeal.
3. The application has been opposed. Moses Wekesa Wamalwa (1st appellant) depones in his affidavit dated 24th April 2024 that the application is intended to delay the hearing and expedite the disposal of the appeal. The land in question has occupants on various leased portions, carrying out their own developments, such as cultivation, tree planting, and leasing, including the 2nd respondent/applicant and the 3rd respondent/applicant, who have been leasing since 2004. The respondents/applicants have not provided any new agreements indicating that they have commenced leasing differently from the usual arrangements since 2004. There is no court injunction served upon the respondents, restraining them from using the land or claiming they are in contempt as alleged. The application lacks merit and should be dismissed.
4. The applicants, in their affidavit dated 2nd May 2025, state that they are unaware of any leasing of the said land that has occurred since 2004. The appellants have leased the land to unknown persons from Kakamega County. The area chief, accompanied by 12 daughters of the deceased, visited the said land on 4th April 2025, only to find that tractors had been deployed by the said lessees to till approximately 30 acres of the said land. The appellants' actions in leasing the said land for over ten years aim to defeat the succession cause, as it will prevent the beneficiaries of the estate from taking immediate possession of their share.
5. The 3<sup>rd</sup> respondent filed written submissions. I have considered the submissions. I have also considered the rival affidavits filed by the parties. The applicants are seeking injunctive orders claiming that the respondents/ appellants have leased about 30 acres of land comprising the deceased's estate. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. For an interlocutory injunction application, the applicant has to satisfy the following requirements to;
  - (a) establish his case only at a prima facie level,
  - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
  - (c) that the balance of convenience is in his favour.
6. The applicant claims that the appellants are leasing the properties in question. The appellants, on the other hand, assert that the land has been leased by both the applicants and themselves since 2004. It isn't easy to discern from the assertions what is or has been transpiring on the ground. The parties are antagonistic towards one another.
7. In the case of *JM v SMK & 4 others* [2022] eKLR the court held as follows; "Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the *Civil Procedure Act*, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the *Civil Procedure*



Act or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing. [ emphasis mine]

8. The Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR held that: “The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”
9. The applicants contend that leasing the land could disrupt their distribution method. Conversely, the respondent asserts that leasing has been occurring since 2004. The parties involved in this matter are antagonistic towards one another. It is difficult to ascertain from the affidavits what is currently taking place on the ground or what has occurred on the land in the past. In my view, the applicants have not persuaded this court that leasing will impact the appeal or distribution of the land. Any injunction order this court might issue would adversely affect other parties who have leased the land. I find that the applicants have not established a prima facie case.
10. The second condition is that the applicants must demonstrate that they will suffer irreparable harm. In the *Nguruman Limited* case (supra) the court expressed itself as follows: “On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
11. The applicants have failed to demonstrate the irreparable damage they will incur, which cannot be compensated through damages. The alleged ten-year lease was not presented in court. The lease period can be quantified, and they can be compensated for the duration of this period.
12. Concerning the third factor, or balance of inconvenience, I believe that this does not favour the applicant either. The applicants have not shown that the inconvenience they would face would be greater than that which may be inflicted upon the appellants.
13. I, therefore, find no merit in the application, and it is dismissed. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY MAY 2025.**

**R.E.OUGO**

**JUDGE**



In the presence of:  
Appellants in person  
Respondents in person  
Wilkister C/A

