



REPUBLIC OF KENYA



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Tungu v Administrators of the Late Ndole Mwakidudu & 5 others (Environment and Land Case E020 of 2025) [2025] KEELC 6149 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6149 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E020 OF 2025
FM NJOROGE, J
SEPTEMBER 23, 2025

BETWEEN

PHILIP MBURA TUNGU APPLICANT

AND

**THE ADMINISTRATORS OF THE LATE NDOLE MWAKIDUDU & 5 OTHERS
& 5 OTHERS & 5 OTHERS RESPONDENT**

JUDGMENT

1. The motion before this court is dated 12th March 2025 and it seeks an interim injunction to restrain the respondents from in any manner interfering with a half of parcel of Land Registration Number Gede/Dabaso/138 (hereinafter also referred to as “the suit property”) said to be currently in occupation and use of the applicant, pending the hearing and determination of the main suit herein.
2. The grounds for the application are contained at the foot thereof and in the supporting affidavit of Philip Tungu Mbura dated also 12th March 2025, as well as his supplementary affidavit dated 28th April 2025.
3. Briefly, the grounds are that the Public Trustee (who is the 6th respondent herein) has allegedly arrogated himself powers to alienate and or interfere with the ownership of the suit property by including it as part of the estate of a deceased person, for distribution to the estate beneficiaries despite the fact that the applicant had purchased it. Secondly, the suit parcel is said to be worth above Kenya Shillings 3,000,000/= which is the maximum value provided for under Section 81 of the *Public Trustee Act* Cap 168 and the authority of the Public Trustee to alienate the suit property has been challenged in the main suit. As a result of inclusion of the suit property among the properties of the estate of the deceased, the applicant’s interests have not been factored in despite his occupation of the suit property for the last 40 years; the applicant who is said to be of advanced age has thus been put at risk of eviction by the beneficiaries as they take up their purported entitlements under the estate distribution plan. The applicant’s suit is seeking several orders inter alia an order of adverse possession.



4. The applicant claims to have purchased the suit land from the family of the deceased where Ali Ndole Mwakidudu and Shariff Ndole executed the sale agreement on behalf of the heirs and the family of the late Ndole Mwakidudu. However, the Public Trustee has had the restriction on the suit title removed. That restriction had been placed at the instance of the applicant. The Land Registrar has removed the said restriction paving way for distribution of the estate; thus, unless this court intervenes and grants the orders sought the respondents are likely to proceed with distribution of the estate of the deceased including the suit land and so it is in the interest of justice that the suit property is preserved pending the hearing and determination of the main suit.

Public Trustee's Response.

5. The Public Trustee filed a replying affidavit sworn by Jafred Erima Maliro, the Assistant Public Trustee. He stated as follows: the suit is res judicata Mombasa HCSC Number 232 Of 1995- OS lodged against the respondents herein in respect of the same subject matter and which is pending for hearing and determination; the Public Trustee has jurisdiction to deal with the estate of the deceased; a certificate of summary administration was properly issued within the law; valuation for purposes of succession administration is as at the date of death of the deceased and not the current valuation; for the estate subject matter of the suit herein the value was Kenya Shillings 100,000 as at 10th September 1976 when the deceased died. All administration processes were followed culminating in the issuance of a certificate of summary administration under Section 8(1) of the *Public Trustee Act*; these included advertising the estate for claims as required by law, and despite a gazetted notice having been published the applicant has never raised any objection to the administration of the estate by the Public Trustee; that now the application has been overtaken by events as the administration process has already been concluded and the assets forming part of the estate of the deceased have been distributed and transferred to the respective rightful heirs. According to the deponent, the rights of the rightful heirs supersede the plaintiff's purchaser's interest, and they should not be injuncted from enjoying the fruits of their inheritance, more so because they were not privy to the alleged agreement of 14th May 1983. The deponent further avers that Rule 41(3) of the Probate and Administration Rules cannot come into play as the applicant is not a beneficiary nor a claimant against the estate of the deceased but a stranger to the estate. He adds that there is no contractual relationship between the estate of the deceased and the applicant that would create beneficial interest in the applicant's favour in the suit land. It is denied that the deceased ever sold the suit land to the applicant, but Ali Ndole Mwakidudu and Shariff Ndole Mwakidudu purportedly sold a portion of the suit property in their individual capacity and any claim should be directed to them in person. It is averred that the vendors lacked capacity to deal with the deceased's property as they were not registered owners nor appointed administrators; that an asset that is part of an estate cannot be transferred before a grant of letters of administration is confirmed by Court; that an appointed administrator can only sell or transfer an asset to a third party with an order of court or express consent of the rightful heirs and so the purported sellers Ali Ndole Mwakidudu and Shariff Ndole Mwakidudu could not support to transact on behalf of the deceased's Estate; their actions cannot bind the estate. It is also alleged that the heirs of the deceased together with their extended families are in occupation of the suit property. It is suggested that the alternative is to hold that Ali Ndole Mwakidudu and Shariff Ndole sold their own entitlement out of the suit land and nothing else. It is denied that any constitutional rights of the plaintiff applicant have been violated.

Applicant's Supplementary Affidavit

6. In his supplementary affidavit, the applicant reiterates that he has been in residence on the suit property for 40 years. The title deed exhibited by the sixth respondent was issued on 12th February 2025 after the restriction was lifted at the instance of the sixth respondent. He reiterates that the distribution of



the suit land was illegal because his interest was not factored in; that he purchased the property when it was bushy. He buried his kin on the same land in 1997 and in 2018 respectively without any objection from the respondents. He denied the assertion that he began living on the suit property in 2015. He has farmed coconuts, mangoes, cashew nut trees and has raised his children on the suit property from the time they were born on the same. He has built semi-permanent and permanent structures on the suit property without any objection from the respondents. Photographs of these developments are exhibited in the supplementary affidavit. Report of the National Land Commission (NLC) which shows that family members from the respondent's family had acknowledged that the process of sale to him were applied to refunding one Ben Kai the purchase price that he had earlier paid for the same property. Now there's no suit that has been hard and determined in respect of his proprietary rights over the suit property.

7. The application was disposed of by way of written submissions. All the parties filed their submissions.

Analysis and Determination.

8. I have considered the application the response and the written submissions.
9. The only issue for determination is whether a temporary injunction should be issued restraining the respondents from in any manner interfering with the plaintiff's quiet possession, use and occupation and/or dealing with the suit property in any manner pending the hearing and determination of the suit.
10. I have considered the fact that the applicant has demonstrated that he has been in possession of the suit property for a lengthy period and that he has developed the same extensively. In the plaint it is claimed that he entered into a sale agreement with the family of Mwakidudu in respect of sale of the suit property which was executed by some members of that family; that the National Land Commission has heard the dispute between the parties herein and stated that the plaintiff is the rightful owner of the suit property. I have considered the report of the National Land Commission concerning this dispute in the preparation of this ruling. In the midst of all the available affidavit evidence there is a fine point that is made to the effect that the suit land had already been sold to a teacher from a primary school but later, after disagreements between him and the late Ndole Mwakidudu himself, the teacher demanded to be refunded the consideration he had paid for the suit land. It is at that juncture that the family took money from the applicant and used it to refund the teacher. It therefore does not appear to have been a very fresh decision by members of the family to sell the land at all. The land was already in the hands of the teacher before the applicant came along. Though the issue can not be finally determined at this stage, in this court's view, it appears that there is a triable issue as to whether there was any intermeddling or lack of capacity in view of the fact that the suit land had already been sold to someone else by the deceased before he died and that the applicant seems to have merely entered the scene to substitute that person after the deceased died. I therefore find the applicant to have a prima facie case.
11. Regarding the issue of loss, I find from the affidavit evidence before court that the applicant has developed the suit land over a lengthy period with both temporary and permanent structures. He is said to be elderly and of no other home. As the suit land was included in the distribution setup and it was transferred to the beneficiaries, any denial of the orders the applicant seeks may expose him to the very eviction he dreads. I thus find that the said eviction may occasion him loss that may not be capable of compensation by way of damages.
12. Having said as above I find that the order of injunction sought is deserved and I therefore grant the application dated 12th March 2025 as prayed in prayer no (c) thereof. The costs of the application shall be in the cause. The parties shall ensure that they comply with Order 11 of the CPR, the applicant within the first 30 days hereof and the respondents within the 30 days subsequent after the expiry of



the period granted to the applicant and the matter shall be listed for a mention on 24/11/2025 for issuance of a mutually convenient hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

