



**Hiribae v Dhadho & another (Environment and Land Appeal  
8 of 2024) [2025] KEELC 3965 (KLR) (20 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3965 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL 8 OF 2024  
FM NJOROGE, J  
MAY 20, 2025**

**BETWEEN**

**DAVID KOMORA HIRIBAE ..... APPELLANT**

**AND**

**ELIJAH KOMORA DHADHO ..... 1<sup>ST</sup> RESPONDENT**

**RAYMOND KUMBI DHADHO ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal challenging the judgment and decree of Hon. E.K Too  
(SPM) delivered on 23/1/2024 in Hola SPM ELC Suit No. E001 of 2020)*

**JUDGMENT**

1. By a Memorandum of Appeal dated 21/2/2024, the Appellant challenges the judgment and decree of Hon. E.K Too (SPM) delivered on 23/1/2024 in Hola SPM ELC Suit No. E001 of 2020, on the following grounds: -
  1. The learned magistrate erred in law and fact in finding and holding that the claim in the suit was in respect to private ownership of community land and that the court was being moved to make declarations of private ownership of community land unprocedurally.
  2. The learned magistrate failed to properly evaluate the evidence adduced by the appellants and the evidence adduced by the Respondent and arrived at a wrong decision.
  3. The learned magistrate erred in law and fact in finding that the land in question was community land notwithstanding no evidence to that effect was adduced before the court.
  4. The learned magistrate erred in law and fact in holding that the orders sought by the parties in the suit cannot be granted.
  5. The learned magistrate erred in law and fact in striking out the suit.



2. Based on the above grounds, the Appellant prayed that: -
  1. This appeal be allowed.
  2. The judgment and decree made on 23/1/2024 by Hon. E.K Too, SPM in SPM ELC Case No. E001 of 2020 be set aside and be substituted with a judgment and decree allowing the appellant's suit as pleaded in the Plaint dated 10/12/2020 in its entirety with costs.
  3. The Appellants be awarded costs of this Appeal.
3. Before delving into the merits of this appeal, it is important to give a brief background of the case.
4. By way of a Plaint dated 10/12/2020, the Appellant filed suit against the Respondents claiming that the Defendants have maliciously and without any justification obstructed him from developing an unsurveyed plot measuring 100 feet by 100 feet situated at Mikinduni area, next to Mikinduni Methodist Church, in Hola within Tana River County (hereinafter also referred to as "the suit property"), which he claimed to be the genuine and rightful owner thereof. He averred that the Defendants forcefully erected a barbed wire fence around the suit property based on illegal claims; that sometime in October 2020, he presented a claim before the office of the Ward Administrator, which in turn referred the dispute to the village elders who adjudicated the dispute in the presence of the Appellant and 2<sup>nd</sup> Respondent herein, and in favour of the Appellant; that on 17/11/2020 the 1<sup>st</sup> Respondent lodged another complaint at the Mikinduni village land committee commonly known as "Kamati ya Ardhi ya Kijiji", which summoned the Appellant on the same date. The Appellant stated that he declined to appear before the said committee as he sensed bias. Ultimately, the said committee found in favour of the 1<sup>st</sup> Respondent and held that the Appellant did not own any plot that neighbors the 1<sup>st</sup> Respondent's. The Appellant sought inter alia to be declared the owner of the suit property and a permanent injunction be issued against the Respondents.
5. The Respondents filed a statement of defence dated 6/1/2021 wherein it was stated that the suit property as described by the Appellant was not proper. They averred that the property in dispute is situated about 300 meters to the North from the Methodist Church and a further 300 meters to the North East of the Church, and that it measures 440 feet by 125 feet. They added that they built a toilet and a house on the suit property in 2009 and referred to the Appellant as an invader. The Respondents averred that the Appellant owns a plot on the eastern side while the suit property is on the western side, separated by a road. According to the Respondents, it was the 2<sup>nd</sup> Respondent who lodged a complaint at the Ward Administrator's office, which issued a stop order on 31/10/2020, halting any dealings with the suit property.
6. The Respondents added that following the meeting of 17/11/2020, the Mikinduni village land committee wrote to the Hola OCS informing him of their decision since the Appellant had created a potential security threat. The Respondents prayed for the dismissal of the suit with costs.
7. The case was subsequently fixed for hearing on diverse dates between 17/1/2023 and 29/8/2023 when the parties called a total of six witnesses each.
8. David Komora Hiribae (PW1) adopted his written statement dated 28/2/2022 as part of his evidence-in-chief. He testified that the suit property belongs to the Ilani clan, of which he is a member, while the Respondents were members of Jaba clan. He stated that he applied for allocation of the suit property in 1987 and was allocated the same by the clan's headman, named Madin Tutu. In cross-examination, the Appellant told the court that he owns the plot next to Mikinduni Methodist Church and that the Defendants' is next to his; that there is a road between the Church and the Defendants' plot. He told



the court that he saw the Defendants' house on the suit property in the year 2006; that when he was allocated the suit property in 1987, he did not build on it until the year 2020.

9. Salim Buya Jillo (PW2) adopted his written statement dated 28/2/2022 as his evidence-in-chief. He told the court in cross-examination that he is the chairman of the council of elders since the year 2022, the Appellant's neighbor for over 20 years, and that he saw the Appellant being given the suit property in 1987.
10. Dhadho Yaro (PW3) equally adopted his written statement. He told the court in cross-examination that he is a member of the village land committee which has been operational from 2014. He added that he was informed of the dispute herein and tasked with demarcating the boundary between the parties' lands.
11. Buya Yusa (PW4) adopted his written statement dated 28/2/2022. He told the court that he was a member of the committee executive but was not present when the suit property was issued. Isack Kharayu Umuru (PW5) told the court that he has land in Mikinduni situated on the lower side of the Church, about 100 meters away, and that the Appellant is his neighbor.
12. Bocha Jamal Shobe (PW6) said to be the Ward Administrator, Mikinduni ward, produced a report prepared by the former ward administrator (PEXH-1). In cross-examination, he told the court that his office does not deal with land matters and that they only follow up the elders' meetings. He stated that the report is dated 21/4/2021 and it was done when the dispute was in court. The witness added in re-examination that the village land committee participated in preparing the report, and that his office prepared the report based on a directive by the Cabinet Secretary, Lands, to form dispute resolution committees.
13. The Respondents' case kicked off with the testimony of the 1<sup>st</sup> Respondent (DW1), who adopted his written statement and produced the documents in the list of documents. He told the court, on cross-examination, that he was allocated the suit property in 2006 by the village land committee before the advent of devolution.
14. On his part, the 2<sup>nd</sup> Respondent (DW2) told the court that the Appellant entered the 1<sup>st</sup> Respondent's plot, the suit property herein, sometime in the year 2006. He added that the Appellant was not their neighbor as his plot was situated far away on the opposite side of the road. Mwanahamisi (DW3) said to be the 1<sup>st</sup> Respondent's wife, added that she lives on the suit property and that the Appellant has also been therein since 2006.
15. Shadrack Jarso (DW5) stated that he is a member and chair of the land committee which allocated the suit property to the 1<sup>st</sup> Respondent. He testified that the committee tried to solve the issue between the parties but the Appellant disappeared. He was categorical that the Ward Administrator never involved the committee in solving the dispute. He added that the Gasa elders' decision is always final.
16. Thereafter, parties filed their submissions and the trial magistrate rendered himself on 23/1/2024 as follows: -
  - “ 10. ...From the evidence on record, it appears the land in question is community land. I must however be quick to state that no evidence has been adduced to that effect before the Court.
  11. I am therefore tasked to determine whether or not the claims herein in respect to private ownership of community land has been proven.



12. No evidence has been adduced to demonstrate that the procedure for conversion of community land to private ownership has been exhausted.
  13. This court is therefore being moved to make declarations of private ownership of community land unprocedurally.
  14. The procedure for conversion of community land into private ownership is clearly set out under the [community land act](#) and no procedure as set out under the Act has been demonstrated to have been undertaken in the current case.
  15. The orders therefore being sought by the parties cannot be granted.
  16. ...
  17. The instant suit is therefore accordingly struck out.”
17. It is against the said judgment that the Appellant has lodged this Appeal based on the grounds highlighted earlier in this judgment.
  18. With the concurrence of the parties, the Court directed that the Appeal be disposed of by way of written submissions.

### **Appellant’s Submissions**

19. In the submissions dated 25/2/2025, counsel for the Appellant submitted that the impugned judgment was erroneous since the dispute between the parties was boundary related and that none of the parties were seeking conversion of community land into private ownership as set out in the [Community Land Act](#). Counsel added that the judgment had no evaluation of the evidence adduced contrary to the provisions of Order 21 rule 4 of the Civil Procedure Rules which provides that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof. In support of this argument, counsel relied on the case of *South Nyanza Sugar Company Limited v Omwando Omwando* [2011] eKLR.
20. Counsel further submitted that despite the trial court ordering the area Ward Administrator to conduct a site visit and deliberate on the dispute and later file a report which was produced as PEXH-1, the trial magistrate failed to analyze the said report or give any reasons for rejecting it.
21. Counsel added that there are two competing claims over the suit property and the learned trial magistrate should have considered the first in time to be allocated the suit property to make a determination on the real issue in controversy. Counsel was guided by the case of *M’ikiara M’Mukanya & Another -v- Gilbert Kabere M’Bijiwe* [1983] KECA 121 KLR.

### **Respondents’ Submissions.**

22. Quoting the definition of community land provided under Article 63 (1) and 63 (2) (d) (ii) of [the Constitution](#) of Kenya, counsel argued that the learned trial magistrate made a proper finding, and urged the Court to dismiss the appeal.

### **Analysis and Determination**

23. This being a first appeal I am conscious of the court’s duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the Law (See *Abok James Odera t/ a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR).



24. In my view, the grounds of appeal challenge the trial court's failure to consider the oral and documentary evidence adduced, failure to consider relevant factors of evidence and law and thus arriving at a wrong finding. The Appellant dealt with the grounds of appeal together. The same approach to dealing with the grounds of appeal will be taken by this court and be summarized into whether or not the learned trial magistrate erred in law and in fact by striking out the suit and making his finding.

25. The suit property is unregistered and unsurveyed. In the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR the court held that: -

“Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.”

26. Further, in the case of *Mumbi M’Nabea v David M. Wachira* [2016] eKLR the court held that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The above provision provides for the legal burden of proof. However, section 109 of the same act provides for the evidentiary burden of proof and states as follows: -

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.””

27. In this case there has been a dispute between the appellant and the 1<sup>st</sup> respondent with the two parties laying claim to the suit property. Each party claims that they were allocated the suit property by the village elders. This to me is evidence enough that the suit property forms part of community land described under Article 63 of *the Constitution*.

28. Notably, on 12/4/2021, following the concurrence of both parties, the court directed the Ward Administrator to file a report regarding the situation on ground. A perusal of the said report dated 21/4/2021 reveals that the actual dispute between the parties is boundary related. Both parties were present in that meeting. The conclusion was that the bushy area of the suit property belongs to the Appellant and that the parties agreed on a common boundary.

29. It must however be remembered that parties are bound by their pleadings. The Appellant sought in his Complaint amongst others, a declaration that the suit property belongs to him and that the Respondents’



claim is illegal. He also sought a permanent injunction against the Respondents. It was also evident that neither party owned any title document over the suit property. From the evidence presented by the Appellant, there was nothing to prove exclusive ownership of the suit property. While I may not entirely agree with the trial court's reasons for dismissing the suit, I am of the view that the Appellant's claim was unsubstantiated, and worthy of dismissal.

30. In the foregoing, I find no merit in this appeal. It is entirely dismissed. Each party shall bear their own costs both in the present appeal and in the court below.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 20<sup>TH</sup> DAY OF MAY 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

