



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mudogo v Sakwa (Environment & Land Case E007 of 2024)  
[2025] KEELC 3834 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3834 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE E007 OF 2024**

**E ASATI, J  
MAY 15, 2025**

**BETWEEN**

**DINA MINAYO MUDOGO ..... APPELLANT**

**AND**

**WALTER SAKWA ..... RESPONDENT**

*((An appeal from the judgement of Hon M. Ochieng, (SPM) delivered on 19th day of February 2024 in HAMISI SPM E & L CASE NO. E007 OF 2022))*

**JUDGMENT**

**Background**

1. A brief background of the appeal herein is that the appellant was the plaintiff and the Respondent the defendant in Hamisi PMC MELC NO. E007 of 2022 (the suit) Vide the plaint dated 19<sup>th</sup> May 2022, the appellant claimed that she was the registered proprietor of land parcel No. Tiriki/Bulukhoba/1589 while the Defendant lives on his father's land parcel known as Tiriki/Bulukhoba/545. The appellant's complaint was that the Defendant had closed the road leading to Muhudu market as a result of which she (appellant) had suffered loss and damage.
2. The appellant sought for the following relief in the suit;
  - a. The opening of access road leading from land parcel No. Tiriki/Bulukhoba/1589 to Muhundu market
  - b. Injunction barring the defendant from blocking the road.
  - c. Costs of the suit
3. The record of appeal shows that the Respondent failed to enter appearance or file defence hence the case proceeded to hearing ex parte.



4. The proceedings show that on behalf of the appellant only the appellant testified, and produced exhibits namely; copy of title for Tiriki/Bulukhoba/1598, search for Tiriki/Bulukhoba/545 and report by County Surveyor Vihiga dated 4/7/2018.
5. No evidence was tendered on behalf of the defendant.
6. The record shows that after hearing the evidence of the appellant, the court delivered its judgment dated 19<sup>th</sup> February 2024 vide which it found that the defendant lacked the locus standi to be used and struck out the suit with no order as to costs as the suit was not defended

### **The Appeal**

7. Aggrieved by the said judgment, the appellant preferred the present appeal vide the Memorandum of Appeal dated 27<sup>th</sup> March 2024 on the grounds that;
  - i. The Learned Magistrate erred in law and fact in holding that the route of access was on land parcel number Tiriki/Bulukhoba/545 when under the law public routes are the property of the government.
  - ii. The learned Magistrate erred in law and in fact in holding that the defendant lacked locus standi to be sued when the actions complained of were committed by the defendant on property he holds no tile to.
  - iii. The Learned Magistrate erred in law and fact in making a decision which was contrary to public interest without reasons to do so.
8. The appellant sought for orders that the appeal be allowed the judgment of the lower court be set aside and the orders prayed for in the lower court be granted.

### **Submissions**

9. Pursuant to direction given on 10/2/2025, the appeal was disposed of by way of written submissions.
10. Written submission dated 2<sup>nd</sup> March 2025 were field on behalf of the appellant by Momanyi Manyoni & Co advocates.
11. Counsel submitted that the evidence showed that the road of access was blocked by the Respondent. That roads of access are not the property of adjoining land owners. That they belong to the local government or national government. That whoever blocks a road of access commits a tort which is independent of the adjoining lands.
12. That nobody sought orders against land parcel No. Tiriki/Bulukhoba/545 and that it was erroneous for the trial court to drag the title into the judgment. That this was a misdirection especially when no defence was entered.
13. No submissions were filed by or on behalf of the Respondent. The record shows that he was served with the record of appeal and mention Notice to attend court. Affidavit of service sworn by Zablon Ochieng Senge on 4<sup>th</sup> February 2025 shows that the Respondent was served with Record of Appeal on the same date. Affidavit of service by the same deponent sworn on 11<sup>th</sup> March 2025 shows that the Respondent was on 17<sup>th</sup> February 2025 served with mention Notice to attend court on 12<sup>th</sup> March 2025. He did not attend court and did not file written submissions.



## Analysis and determination

14. This being a first appeal the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs- Attorney General* [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

"Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect".

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 and *Peter M. Kariuki vs attorney General* [2014]eKLR)

15. The first ground of appeal faults the trial court for holding that the route of access was on land a parcel number Tiriki/Bulukhoba/545.
16. The appellant had pleaded in paragraph 3 of the plaint that the Respondent resides on his father's land known as Tiriki/Bulukhoba/545 where he had closed the road leading to Muhudu market. In paragraph 5 she pleaded that the Ministry of lands visited the scene and duly informed the Respondent to rectify the road but he had remained unresponsive.
17. In her witness statement dated 19<sup>th</sup> May 2022 which was adopted as her evidence in chief, the appellant stated that from her land parcel No. Tiriki/Bulukhoba/1589 if she wants to go to Muhudu market she uses an access road which is on the map.
18. That in the year 2018 she found out that she could not use the access road because of the structures put up by the defendant. The appellant produced a surveyor's report as one of the exhibits.
19. The record shows that it is the surveyors report produced by the appellant that had the findings that the road on one side is diverted to pass through the parcel number BULUKHOB/545 so as to connect with another road on the southern side of the stream. The report found that most of the road had been encroached onto by the owner of the land parcel No. Tiriki/Bulukhoba/545.
20. In the circumstances, the court was only quoting the findings of the surveyor as contained in the survey report produced by the appellant for the purpose of ascertaining whether the Respondent had capacity to be sued.
21. The court did not err , misdirect itself or unnecessarily drag land parcel number Tiriki/Bulukhoba/545 into the suit.
22. The second ground of appeal is that the court erred in finding that the Respondent had no capacity to be sued.
23. Once again according to the surveyor's report. The dispute as to the position of the road of access was between the owner of land No. Tiriki/Bulukhoba/545 and the owners of parcel Nos Tiriki/Bulukhoba/1589 and 1588.
24. The report further indicated that most part of the road had been encroached onto by the owners of land parcel No. 545 where at some point it passes through the wall of a house. It was the appellant's case that the owner of parcel No. 545 was deceased. There was no evidence that the Respondent was



the personal representative of the owner of land parcel No. 545. It is clear that whatever orders that the court was to ultimately make were to affect the owner of land parcel No, 545. I find that the court did not err in finding that the respondent having not taken out Letters of Administration in respect of the estate of his father had no capacity to be sued. Under provisions of sections 2, 76 and 82 of the Law of Succession Act a party who has not taken out Letters of Administration has no capacity to be sued in respect of the estate of a deceased person.

PARA 25

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The last ground of appeal is that the decision was contrary to public interest.

26. It has not been demonstrated how this is so. Perusal of the Judgment shows that the trial court relied on the evidence that had been availed by the appellant and which showed the owner of land parcel No. Tiriki/Bulukhoba/545 ought to have been a party in the proceedings and that the person sued was not such owner.

27. I find that the grounds of appeal have not been proved. The appeal is hereby dismissed. No orders as to costs as the Respondent did not defend the suit or the appeal.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 15<sup>TH</sup> DAY OF MAY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Ajevi-----Court Assistant.

No appearance for the appellant.

No appearance for the Respondent.

