



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLA E037 OF 2024**

JAMES KAMAU WAMENJU ..... APPELLANT  
VERSUS  
NELSON NYAGA NGINGO.....1<sup>ST</sup> RESPONDENT  
FRANCIS MACHARIA NYAGA.....2<sup>ND</sup> RESPONDENT  
ANTONY GATHURA(Suing on behalf of the estate of  
PETRONILLA WAKIYU NYAGA(Deceased).....3<sup>RD</sup> RESPONDENT  
STEPHEN MACHARIA RUTHI.....4<sup>TH</sup>  
RESPONDENT  
THE COUNTY GOVERNMENT OF MURANG'A.....5<sup>TH</sup> RESPONDENT

## **JUDGMENT**

- 1) The Appellant seeks the following orders in this appeal.
  - (i) This appeal be allowed.
  - (ii) The judgment and orders of the trial court be set aside and the Plaintiffs suit be dismissed.
  - (iii) The costs of this appeal and those of the lower court be awarded to the Appellant.
  - (iv) Any further or other relief the Court may deem just.
- 2) The memorandum of appeal amended on 19-8-2024 contains ten(10) grounds.
  - (a) The learned magistrate erred in law in determining that the open space granted to the Appellant by the 5<sup>th</sup> Respondent was on the frontage of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' mother's plot No. Loc.8/Kandengeny/284/24, suit land.
  - (b) The learned magistrate erred in fact in determining that excavation in the open space was on the frontage of the suit land.
  - (c) The learned magistrate erred in fact in failing to define what was the frontage of the suit premises *vis a we* open space and the Mukuyu-Kahuro-Muriranja tarmac road.
  - (d) The learned magistrate erred in fact and in law in not dismissing the suit based on the testimony of P.W.1 who admitted that his entrance to

**the suit premises was from the front and it was Posta that denied him access to the suit land, not the excavation on the open space.**

- (e) The learned magistrate made conclusions not based on evidence by stating that there was excavation on the space at frontage of the suit land. The court failed to appreciate that the frontage is the road.**
  - (f) The learned magistrate discontinued and misapprehended the photographs which she said showed the frontage of the suit premises had been blocked. The learned magistrate ought to have made the finding that the photographs were evidence that there was no blockage.**
  - (g) The learned magistrate failed to consider in evidence a map showing the frontage and the back yard of the suit premises and the letter dated 11-2-2022 which showed that the suit plot was fronting a road at the back and the front as depicted in the said map and explained in the said letter and that any attempt to access the plot from the open space amounted to trespass into the said open space which did not belong to the late Petronilla Wakiyu Nyaga.**
  - (h) The learned magistrate introduced in her judgment a patently irrelevant issue to wit that the 4<sup>th</sup> and 5<sup>th</sup> Respondents failed to consider public participation. That was not raised by any party and there was therefore no notice that the issue would arise so as to avail evidence. The court made the observation without stating how much public participation was necessary in respect to a temporary occupation license of an admittedly free space.**
  - (i) The learned magistrate substantially and wrongly changed the dynamics of the case from lacking a frontage to one of unapproved excavation on the free open space.**
  - (j) The learned magistrate judgment and orders are against the weight of evidence arising from misapprehending the case before the Court and dealing with non-issues. The court failed to identify the issues for determination and the judgment does not comply with Order 21 rules 4 and 5 of the Civil Procedure Rules.**
- 3) The facts of the case according to the Plaintiffs were that the deceased Petronilla Wakiyu Nyaga owned LR No. Loc.8/Kandegenye/284/24 as she had a 99 year lease issued on 11-11-1985. Secondly, on various dates in the year 2021, the 1<sup>st</sup> Defendant carried out extensive excavation on the frontage of the suit premises in a manner that denied the Plaintiffs access to the suit plot. Thirdly, during the same period, the 2<sup>nd</sup> Defendant commenced illegal and unlawful construction on the frontage of the excavation carried out by the 1<sup>st</sup> Defendant thus further denying the Plaintiff access to the suit plot. As a result of this, the Plaintiff has no access to the suit premises.

Fourthly, the frontage is not a registered parcel or plot as it forms the frontage and access to the suit premises. Fifthly, the 3<sup>rd</sup> Defendant took no action even after being notified of the illegal actions. Finally, the excavation of the deep trenches and the mushrooming of the structures and buildings on the frontage of the suit plot further exacerbates the problem created by the blockage.

- 4) The Defence by the 1<sup>st</sup> Defendant is a one page denial. The defence by the second Defendant is as follows. The space he is developing was allocated to him by the 3<sup>rd</sup> Defendant by virtue of the fact that it has the sole and unfettered discretion to allocate land within the County. The space does not form the so called frontage of the Plaintiffs plot. Thirdly, the space allocated by the 3<sup>rd</sup> Defendant is not in front of the Plaintiff's plot and does not interfere with his access as there is access at the back of the suit plot. Fourthly, the 2<sup>nd</sup> Defendant pays all rent and rates due to the County Government. Finally, the space is 35 feet away from the Plaintiffs space and it does not form part of the Plaintiff frontage and the Kahuro Sub County office has confirmed that it does not form part of the Plaintiff's frontage. The third Defendant filed a half page defence which is a denial of the averments by the Plaintiffs. A witness statement by David Njoroge, the Sub County planner in charge of Kangema and Kahuro is to the effect that the structures complained of are built on unregistered land hence a reserve.
- 5) Counsel for the parties filed written submissions dated 17-6-2025, 17-7-2025 and 30-8-2025.

The Appellant's counsel identified four issues for determination.

- (i) Which was the frontage area of the suit premises and was the open space part of it?**
- (ii) Was there excavation in the said frontage? By whom?**
- (iii) Where were the Appellant's temporary structures built or being built?**
- (iv) Were the 1<sup>st</sup> and 3<sup>rd</sup> Respondents denied access to their property through the frontage on the Makuyu-Kahuro road?**

The 5<sup>th</sup> Respondent supports the appeal as can be discerned from its written submissions dated 17-7-2025.

- 6) This being a first appeal, this Court has a duty to do the following in considering this appeal. Firstly, it must re-evaluate, reassess and reconsider the evidence presented before the trial Court. Secondly, it must make its own independent conclusion based on that evidence. Thirdly, it should bear in mind that it did not see or hear the witnesses and therefore make allowance for this. Finally, it must exercise its own independent judgment. This was the holding in the case of **Selle vs. Associated Motor Boat Co. Ltd[1968] E.A. 123** by the East African Court of Appeal.
- 7) I have carefully considered the appeal in its entirety including the grounds, the record and the written submissions by learned counsel for the parties. I find that the best way to deal with this appeal is to examine each of the ten grounds of appeal. A look at grounds 1,2,3,4,5,6,7 and 9 shows that they relate to the frontage of the suit plot and what the Appellant’s counsel calls “free open space” All these grounds can be decided as one issue simplified as follows.

**(1) Whether the frontage of the suit land extended to the Mukuyu-Kahuro-Muriranja tarmac road or there was an free open space between the suit plot and the road. Grounds numbers 8 and 10 will each be handled separately.**

- 8) The key to resolve grounds 1,2,3,4,5,6,7 and 9 lies in the definition of the word frontage. The trial magistrate has been faulted for determining that the open space granted to the Appellant by the 5<sup>th</sup> Respondent was on the frontage of the suit plot; that the excavation in the open space was on the frontage of the suit plot; failing to define what the frontage of the suit plot was vis a vis the open space and the Mukuyu-Kahuro-Muriranja tarmac road and other errors all based on her failure to determine that the frontage and open space are two different spaces.

It is true that the judgment dated 24-7-2024 did not define what the word frontage meant. It is clear from her judgment that she understood the word to include the open space. That is the reason why the Appellant filed this suit. Once the meaning of frontage is resolved, we will have dealt with eight of the ten grounds of appeal.

In his written submissions dated 17-6-2025, the learned Counsel for the Appellant has not endeavored to define the word frontage but in his thinking, it does not include the open space.

Under the Physical and Land Planning (Building) Regulations, 2021 made pursuant to the Physical and Land use Planning Act, 2019, the term frontage is defined as follows.

**“A strip of Land between a commercial development and a carriage way.”**

A carriageway is defined as “ **the part of a road designed, constructed and normally used for vehicular traffic; Highway .**”

This is according to the 11<sup>th</sup> edition of Black’s Law Dictionary. In the same dictionary, the word frontage is defined as follows.

**“The part of land abutting or lying between a building’s front and a street, a highway, or body of water,”**

From the two definitions above it is clear to me that all the space from the suit plot to the Mukuyu-Kahuro-Muriranja tarmac road is the frontage and there is no free open space between the suit plot and the road. This means that the learned trial magistrate did not err and grounds 1,2,3,4,5,6,7 and 9 are not valid.

- 9) Regarding the 8<sup>th</sup> ground of appeal, I find that the issue of public participation raised in the 8<sup>th</sup> ground was not irrelevant. It arose at the trial as can be seen at page 141 of the record or appeal where PW1 on examination is on record as saying,

**“ I was not called for public participation when plots were issued to the Defendants”**

More importantly, Section 4 of the Physical and Land use Planning Act(Act No 13 of 2019) binds every state organ, state officer, public officer and person engaged in Physical planning or land use to observe the national values and principles set out in Articles 10 and 232 of the Constitution. Public participation is one of the national values and principles of governance under **Article 10(2) (a)** of the Constitution. Further to the above, under Section 5 of the same Act, every person engaged in Physical and land use planning and regulation should adhere to the principles and norms of physical and land use planning which include promotion of sustainable use of land, development activities to be planned in a manner that integrates economic, social and environmental needs of the present and future generation among others.

The County Governance of Murang’a was therefore expected to have adhered to the above principles in allocating the space between the suit land and the road to the Appellant.

The trial magistrate was within her jurisdiction in questioning whether there was public participation because **Article 10(1) (b) and (c)** provide that the National values which include public participation bind all state organs, state officers, public officers and all persons wherever any of them interprets any law or makes public policy decisions. Neither the Appellant nor the County Government of Muranga had

anything to show for all these constitutional and statutory requirements. There was no explanation at all as to why the Appellant's structures had to be built on a road reserve abutting an existing building and next to the road. The County Government did not come clear on this issue.

- 10) Under **Order 11 rule 3(1) (a)** of the Civil Procedure Rules, contested and non contested issues in a trial are identified at the pretrial conference. Again under **Order 18 rule 2(2)** of the same rules, it is expected that the Defendant who is the first to submit where he has adduced evidence, is the first to submit. In the submissions the Defendant should have identified the issues for determination. A look at the submissions at page 104-108 of the record of appeal shows that the Defendant's submissions did not identify any issues.

The Court may frame its own issues for determination proceeding under **Order 15 rule 2** of the **Civil Procedure Rules** but this is not mandatory.

It is not therefore proper to blame the trial magistrate for failure to frame the issues when that obligation fell on the Defendants one of whom is the Appellant himself. In ground number 10, the Appellant is blaming the trial magistrate for what the magistrate was not obligated to do but which the Appellant himself ought to have done. Looking at the judgment itself, I find that it is in strict compliance with **Order 21 rules 4 and 5** of the Civil Procedure Rules because it has stated the orders sought, the Plaintiff's case, the Defendant's case as well as the disputed and undisputed issues. The judgment contains the reasons for the decision which include failure to avail proof of authority from the County Government of Murang'a to construct, failure to hold public participation by the people around the excavated area among others.

- 11) In conclusion and for the reasons already given, I find no merit in the Appellant's appeal which I dismiss with costs to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents.

**Dated, signed and Delivered virtually at Murang'a this 17<sup>th</sup> day of December, 2025.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of :-**

**Mwangi Njonjo - Court Assistant**

**Appellant's Counsel – Absent**

**1<sup>st</sup> and 3<sup>rd</sup> Respondent's Counsel – Mr Kirubi**

**5<sup>th</sup> Respondent's Counsel – Mr Kimwere**