



**Njoroge & another v Nyingi (Environment and Land Appeal
E005 of 2024) [2025] KEELC 5618 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

MN GICHERU, J

JULY 29, 2025

BETWEEN

SUSAN M NJOROGE 1ST APPELLANT

HARRISON MWANGI MWITHIGA 2ND APPELLANT

AND

FELISTA WANJIRU NYINGI RESPONDENT

(Being an appeal against the judgment of the Learned Magistrate Hon. E.M. Nyagah, S.P.M. delivered on 23/01/2024 in Murang'a CMELC No. E059 of 2021)

JUDGMENT

1. In this appeal, the Appellants seek the setting aside of the judgment dated 23-1-2024. In the judgment in Murang'a ELC Case No. E059 of 2021, the learned trial magistrate found that the Appellants, Joseph Kinyeru Ngumba and Mwangi Mwithiga had trespassed on the suit property which belongs to the Respondent, it being L.R. Murang'a/Municipality/Block 2/528 and ordered that they be evicted therefrom.

2. Dissatisfied with the verdict of the learned trial magistrate, the Appellants filed this appeal which contains seven(7) grounds of appeal as follows.

The learned trial magistrate erred in law and fact by-

- i. failing to state specifically whether the 1st Appellant's kiosk was among the ones encroaching the suit land,
- ii. failing to indicate the positioning of the kiosk vis-à-vis the suit land,
- iii. finding that the suit land had been encroached while also indicating that the beacons of the suit land could not be pointed out with precision,



- iv. refusing to issue orders to call the maker of the report dated 30-8-2023 despite application to do so, for cross-examination by the Appellants' counsel,
 - v. failing to give the Appellants' counsel time to submit and by rendering judgment while the Appellants had not closed their case,
 - vi. failing to find that there were 100 kiosks near the suit land and which "allegedly" have encroached the suit land hence the suit ought to have been brought in a representative capacity and thus the suit as filed was incompetent as against any other parties,
 - vii. issuing a vague judgment that was not directed to any particular person or party and thus unenforceable,
 - viii. failing to find that the 2nd Appellant was wrongly sued and
 - ix. failing to grant costs to the 2nd Appellant.
3. The facts of the case according to the Respondent are as follows. Firstly, she is the registered owner of the suit land which she acquired in the year 1991. Secondly, the Appellants and two other persons have trespassed onto the suit land and they have refused to vacate making it difficult for the Respondent to develop her land as desired. Finally, she wanted the trespassers evicted from the land.
4. The facts of the case according to the Appellants are as follows.
Firstly the 1st Appellant was allocated a Kiosk/Canteen by the Municipal Council of Murang'a. The said Kiosk which is semi permanent in nature is located on a road reserve within Murang'a town next to Marigiti market, a public utility. Secondly, she has not encroached on the suit land. The 2nd Appellant's case was that he did not have any kiosk or stall around the suit land and he was not in any way encroaching on the suit land.
5. A report by the County Surveyor Murang'a which is undated but which was received in court on 30-8-2023 found that the suit land has been encroached upon and temporary wooden and iron structures erected on one side and a permanent stall building constructed on another side.
6. Counsel for the parties filed written submissions dated 25-2-2025 and 25-6-2025 respectively. None of the submissions has identified any issues for determination. I will therefore treat the nine(9) grounds as the issues for determination.
7. On the 1st ground, I find that the learned magistrate did not err. The first Appellant's Kiosk does not have a specific number. She said that it was on the road reserve. If this is the case, then she need not worry because she will not be effected by the eviction. However, if it turns out that she is on the suit land, then she will be evicted. The trial magistrate was entitled to go by the report of the County Surveyor which confirmed the encroachment. The Appellants did not offer better evidence than the one adduced by the County Surveyor. This finding covers the second ground of appeal.
8. I find that the trial magistrate did not err because the report by the surveyor was clear as to why the beacons could not be pointed out with precision. The reason is that they are covered by obstacles. These obstacles are both wooden, iron and the permanent stall building that encroaches on the suit land. The obstacles have to be removed first before the beacons are restored.
9. There is nothing on record to show that the Appellants applied to have the surveyor testify in Court. There were two interlocutory applications. One was by the Respondents seeking orders of injunction. It is dated 16-8-2021. The other is dated 7-9-2021 and it seeks to join the County Government of Murang'a as an interested party and an order for a report by Murang'a County Physical Planner to



establish the measurements and boundaries of the suit land. There is no other application before judgment. Post judgment, there is the motion dated 31-1-2024 seeking stay of execution. On the written record, I have not seen any oral application seeking the viva voce testimony of the County Surveyor.

10. It seems that the counsel for the parties did not file any written submissions in the lower court. The record does not show why no submissions were filed as is the practice. However, it is my finding that submissions are not evidence and even without them, the learned trial magistrate arrived at the right conclusion in this case. No amount of submissions would have changed the fact that the Appellants do not own the land that they occupy and that it is registered in the name of the Respondent.
11. The Respondent had no obligation at all to sue Kiosk owners who had not encroached on the suit land. In fact, she had no cause of action against the 100 kiosk owners who did not encroach on her land. The cause of action against the other kiosk owners lies with the owners of the encroached land by the other kiosk owners.

Order 1 rule 8(1) of the Civil Procedure Rules provides that

“where numerous persons have the same interest in any proceedings, the proceedings may be commenced by all of them (if they are Plaintiffs) or against (if they are Defendants) any one or more of them as representing all or as representing all except one or more of them.”

My understanding of this provision is that it is optional for a party or parties suing to sue one or more of the Defendants. There is no obligation on parties having a joint cause of action to bring a suit together. One can break away from the others and sue alone. He could also file a joint suit together with other Plaintiffs. In this case, the suit land belonged to the Respondent alone and the trespassers are not 100 kiosk owners but specific people who in this case were the four Defendants.

12. While it is true that the judgment dated 23-1-24 does not specifically say it is entered as per the plaint dated 16-8-2024 which had four (4) specific prayers, it says that judgment is entered for the Plaintiff and those who have encroached on her property do vacate. There is therefore no ambiguity or vagueness as to who the judgment is directed at and what they should do. The word vacate is powerful and clear.
13. In his statement dated 7-10-2021, the 2nd Appellant said that he does not have a kiosk or stall and he did not know why he was sued. He did not ask for costs. Even the Respondent who should have been awarded costs got none. I find that the 2nd Appellant has only himself to blame for failing to ask for costs when he testified in court on 23-1-23 and also being silent on costs in his witness statement.
14. For the above state reasons, I dismiss the appeal dated 29-1-2024 with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF JULY, 2025.

M.N. GICHERU JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellants' counsel – Absent

Respondent's Counsel – Mr Mwenesi.

