



REPUBLIC OF KENYA



**Waweru v Mbugua & 2 others (Environment and Land Case E020 of 2025)
[2025] KEELC 6776 (KLR) (Environment and Land) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND**

ENVIRONMENT AND LAND CASE E020 OF 2025

MC OUNDO, J

OCTOBER 9, 2025

BETWEEN

PAUL NGURE WAWERU PLAINTIFF

AND

SMITH MBUGUA 1ST DEFENDANT

**GABRIEL GITAU KOMO (AS ADMINISTRATOR OF THE ESTATE OF
PATRICK KOMO NJOROGE - DECEASED) 2ND DEFENDANT**

GABRIEL GITAU KOMO 3RD DEFENDANT

RULING

1. The instant suit was instituted vide a Plaint dated 24th February, 2025 wherein the Plaintiff sought for the following orders:
 - i. A declaration that the 1st, 2nd and 3rd Defendants trespassed on his land unlawfully.
 - ii. Loss of expected crop yield disrupted.....Kshs. 11,998,800/=.
 - iii. Mesne profits for use of his land including the full value of the proceeds of sale or horticultural products by the 1st, 2nd and 3rd Defendants from encroached portion as from January 2000 to the year 2020 amounting to Kshs. 7,955,655/= by the 1st Defendant and Kshs. 57,146,400/= by the 2nd Defendant totaling to Kshs. 65,102,055/=.
 - iv. Special damages in the sum of Kshs. 184,220/=.
 - v. General damages.
 - vi. Costs of the suit together with interest at court's rate.



- vii. Such further and/or other relief that the honourable court may deem fit and just to grant in the circumstances of the suit herein.
2. Pursuant to the service of the Plaint upon the Defendants, the 2nd and 3rd Defendants filed a Notice of Preliminary Objection dated 13th May 2025 seeking for the Plaintiff's suit to be struck out for being time barred and Res Judicata. Accordingly, the Court had granted the Defendants leave to file and serve their substantive Notice of Motion.
 3. Subsequently, what is before me for determination is the 1st Defendant's Notice of Motion dated 29th May 2025 and the 2nd and 3rd Defendants' Notice of Motion Application dated 27th May 2025.
 4. The 1st Defendant's Application is brought pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Section 4(2) of the *Limitation of Actions Act* and all other enabling provisions seeking for orders that the entire suit is res judicata Nakuru CMELC Suit No. 223 of 2018 and secondly that the suit is statutory time barred pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act* and should therefore be dismissed with costs.
 5. The said application is premised on the grounds therein as well as the Supporting Affidavit of equal date sworn by Smith Mbugua, the 1st Defendant herein who deponed that he is the registered owner of the property known as L.R. Gilgil/Karunga Block 9/1206.
 6. That he had zealously defended the suit in CMELC Suit No. 223 of 2018 between Paul Ngure Waweru vs Smith Mbugua and Patrick Komo Njoroge. That parties in both suits are the same in that Gabriel Gitau Komo, the 2nd and 3rd Defendants in the present suit were the administrator and the son of the 2nd Defendant in CMELC Suit No. 223 of 2018 where the Plaintiff Paul Ngure Waweru had filed suit via a Plaint filed on 4th September 2018 claiming that the Defendants herein had encroached/trespassed on his land L.R. Gilgil/Karunga Block 9/1945.
 7. That the judgement dated 21st April 2020, had subsequently resolved the entire suit between parties and parcels of land being Gilgil/Karunga Block 1945, Gilgil/Karunga Block 9/1206 and Gilgil/Karunga Block 9/1205 wherein parties had been advised to adhere and respect the boundary as per the Registry Index Map (RIM).
 8. That the present suit was a disguise to seek damages and losses allegedly suffered directly from the same facts and transaction that had been adjudicated in CMELC Suit No. 223 of 2018 and therefore sought to relitigate matters on trespass and encroachment all over which was in bad faith, frivolous, malicious and an afterthought.
 9. He deponed that the Plaintiff/Respondent ought to have presented his entire case in CMELC Suit No. 223 of 2018 considering that he had pleaded trespass, damages and loss thus the instant suit was disguised as a new cause of action in an attempt to hide from the claws of Res Judicata and same ought to be dismissed in limine.
 10. That further, the Plaintiff's cause of action is statute time barred, considering that it was based on the alleged tort of trespass which started in the year 2000 and ended in the year 2020. That accordingly, it was manifest that in addition to being res judicata, the instant suit had been filed out of time hence the court lacked jurisdiction to entertain the same.
 11. That it was therefore in the interest of justice, judicial economy, judicial time and finality of litigation that the court upholds the sanctity of its process and strikes out the suit herein with costs.



12. The 2nd and 3rd Defendant's Notice of Motion Application dated 27th May 2025 on the other hand is brought pursuant to the provisions of Sections 1A, 1B, 3A, 7 and 63 of the *Civil Procedure Act* (Cap 21) Laws of Kenya, Section 4(2) of the *Limitation of Actions Act*, Order 1 Rule 10(2), Order 3 Rule 4, order 51 Rule 1 of the Civil Procedure Rules 2012 and all other enabling provisions of law wherein they sought for the following that apart from being wrongly enjoined to the suit and should be struck out, the suit was res judicata by dint of a judgement delivered on 21st April 2020 in Nakuru CMELC No. 228 of 2018, Paul Ngure Waweru v Smith Mbugu and Patrick Komo Njoroge. That further, the Plaintiff's claim for damages was time barred by dint of the report by County Director of Agriculture, Nakuru County dated 30th September 2021. They sought for cost.
13. The said application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Gabriel Gitau Komo, the 3rd Defendant herein who deponed that he had been sued as a Personal Representative of the Estate of the deceased; Patrick Komo Njoroge who died on 31st October 2021 despite him not being an Administrator to the estate of Patrick Komo Njoroge (Deceased) nor him being the registered owner of parcels of land Nos. Gilgil/Karunga Block 9/1945, 9/1205 and 9/1206.
14. That indeed, the Plaintiff herein had sued the 1st Defendant and the late Patrick Komo Njoroge in Nakuru CMELC No. 228 of 2018, wherein judgement had been delivered on 21st April 2020.
15. That in Nakuru CMELC No. 228 of 2018 filed in the Magistrate's Court at Nakuru, the Plaintiff had sought for orders inter alia; -
 - i. Permanent injunctive orders against the Defendants.
 - ii. An order of eviction.
 - iii. Loss and damages suffered by encroachment by the Defendants.
 - iv. Costs and interests.
16. That in the present suit, the Plaintiff in summary seeks for judgment against the Defendants as follows;
 - i. A declaration that the Defendants trespassed on his land.
 - ii. Loss of expected yield disrupted, value of sale of horticulture products, special damages and general damages.
 - iii. Mesne profits.
 - iv. Costs of the suit and interest.
17. That the Plaintiff in order to try and wood wink the jurisdiction of the Honorable court presents a mixed grill of prayers for crop yields and mesne profits jointly and severally. That whereas the report by the County Director of Agriculture, Nakuru County had been prepared on 30th September, 2021, the suit herein had been filed on 28th March, 2025 being 3 years, 6 months from the date of the said report and 7 years from the date of the determination of Nakuru CMELC No. 228 of 2018. That indeed, the Plaintiff had opted to litigate his claim in instalments as against the Defendants herein. That subsequently, it was clear that the Plaintiff's suit as filed was an abuse of the court process and should be struck out with costs.
18. In response and in opposition to the Defendants Applications, the Plaintiff filed his Replying Affidavits dated 11th June 2025 and 19th June 2025 deponing that Nakuru CMELC No. 228 of 2018 was founded purely on a boundary dispute while the instant case was for damages and costs for loss,



he had incurred which had exceeded the jurisdiction of the Magistrate court. That the two causes of action were different.

19. That delay in filing the instant suit had been caused by the fact that he had been waiting for the jurisdictions (sic) of the suit referred to above as Nakuru CMELC No. 228 of 2018 and also looking for the money to pay for the legal services. That the 1st Defendant had the authority to represent his father because he had been the one who always stood for his father as his personal representative. He denied there having been a case No. 228 of 2018 between the Plaintiff and Defendants as had been stated in the 3rd Defendant's Affidavit.
20. That the surveyor had made a supplementary valuation to the original valuation dated 30th August 2021 and the one dated 29th April 2025 thus the instant case had been filed on time.
21. That previously, interlocutory judgement had been entered against the Defendants thus the instant application had no basis because the Defendants had not denied liability and damages as had been prayed in the Plaint. That subsequently, the instant Application could not be an appearance or Defence as it could not precede the appearance and Defence.
22. The Applications were disposed of by way of written submissions wherein the 1st Defendant vide his submissions dated 8th July 2025 framed his issues for determination as follows:
 - i. Whether the matter herein is Res Judicata.
 - ii. Whether the suit is time barred.
 - iii. Who should be awarded costs?
23. On the first issue for determination, he submitted in the affirmative to the effect that the Plaintiff herein sought to take advantage of the instant matter which had been adjudicated and settled without the Respondents registering their grievances through an appeal. That in any case, parties had entered into a consent which had disposed off the matter. He placed reliance in the decided case of Peter Mbogo Njogu v Joyce Wambui Njogu & another [2005] eKLR.
24. He submitted that the Plaintiff herein neither appealed as against the judgement in CMELC 223 of 2018 nor sought to have the same reviewed thus he was seeking for the court to sit on appeal and re-adjudicate the matter. Reliance was placed in the decided case of Gurbacham v Yowani Ekori [1958] EA 450 cited with approval by the Court of Appeal of Eastern Africa in Henderson v Henderson (1), 67 E.R. 313 at page 319.
25. That whereas the Plaintiff had in CMELC 223 of 2018 pleaded encroachment on his parcel of land No. Gilgil/Karunga Block 1945 wherein he had been deprived of the use and enjoyment of the said land for which he suffered damage and loss, he never sought for compensation of the alleged loss and damage but chose to file the instant suit seeking the same.
26. He placed reliance on the provisions of Section 7 of the *Civil Procedure Act* and the decided case of E.T v Attorney General & Another [2012] eKLR to submit the instant matter had been settled by a mutual consent agreement between all the parties who had indeed found the terms of the said consent sufficient enough to have the same adopted as a judgement of the court. That instead, the Plaintiff has filed the instant suit in order to circumvent the consent judgement thereby seeking to defeat the cause of justice.
27. Reliance was placed in the decided case of Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 Others [2017] eKLR to submit that the instant suit was not only a waste of judicial resources but an abuse of the court process and should thus be struck out



for being res judicata wherein the Court lacked jurisdiction to try it having been heard and determined by consent of parties.

28. That the suit was also time barred, pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act*. He placed reliance in the decided case of M'Mkanya v M'Mbijiwe (1984) KLR 761 to submit that the instant suit having been founded on the tort of trespass where the Plaintiff was seeking compensation, the alleged actions of trespass by the Defendants had ceased in the year 2020. That by dint of the provisions of Section 4(2) of the Law of Limitations Act, it was clear that the Plaintiff's suit was time barred having admitted that his cause of action whether merited or not, had accrued from the year 2020 yet the instant suit was filed on 28th March 2025 via a Plaint dated 24th February 2025.
29. That costs were awarded to compensate the successful party for the trouble taken to prosecute or defend the suit and whilst there must be an end to litigation, the Plaintiff herein having been keen on regurgitating matters that had already been determined, wherein his suit had no merit, the court should dismiss the same for being grossly incompetent, res judicata and an abuse of the court process.
30. The 3rd Respondent's submissions dated 30th June 2025, were based on the following issues for determination:
 - i. Whether the 2nd and 3rd Defendants were wrongly enjoined in the suit herein.
 - ii. Whether the Plaintiff's suit is time barred by dint of the provisions of Section 4 (2) of the Law of *Limitation of Actions Act* (Cap. 22) Laws of Kenya.
 - iii. Whether the Plaintiff's suit case (sic) offends the provisions of Section 7 of the *Civil procedure Act* (Cap. 21) Laws of Kenya, by dint of a judgment delivered on 21st April, 2020 in CMELC No. 223 of 2018, Paul Ngure Waweru vs. Smith Mbugua & Patrick Komo Njoroge, in the Chief Magistrate's Court at Nakuru.
 - iv. Whether the 3rd Defendant/Applicant is entitled to the prayers sought in the Application.
 - v. Who should bear the costs?
31. On the first issue for determination, the 3rd Defendant's submission was although he was a son to Patrick Komo Njoroge (deceased), he had been sued in his own capacity and as the 2nd Defendant being an administrator of the estate of his deceased father, he neither was a registered owner of any of the suit properties nor had he been appointed as a legal representative of the deceased's estate. Reliance was placed in the case of Mayange (Deceased) v. TG (Minor suing through her mother and next of friend WMG) (Civil appeal E005 of 2022) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling) where the Court had cited the case of Viktar Maina Ngunjiri & 4 others v. Attorney General & 6 Others [2018] eKLR at Para 25.
32. That subsequently, he could not be sued in the manner that the Plaintiff/Respondent had purported thus on that account alone the instant suit should be declared a nullity.
33. On the second issue for determination, he submitted that the Plaintiff's suit was time barred by dint of the provisions of Section 4 (2) of the Law of *Limitation of Actions Act*. That the dispute between the Plaintiff/Respondent and Patrick Komo Njoroge started sometimes in the year, 2000 wherein judgment had been rendered vide CMELC No. 223 of 2018 on 21st April, 2020. That it was not until 30th September, 2021 that the Plaintiff/Respondent had a report prepared by the County Director of Agriculture, Nakuru County for him to lay a claim for trespass, crop yield and mesne profit for the period between the year, 2000 and 2020, which was over 22 years down the line. That subsequently,



- the Plaintiff/Respondent, should have been diligent enough to discover his claim considering that he had a chance to file a proper suit in the year, 2018.
34. That by dint of filing the CMELC No. 223 of 2018, the Plaintiff/Respondent had been aware of the cause of action premised on trespass, but did not bother to pursue it until 7 year later in the year, 2025, for reason that the honorable court was clothed with jurisdiction for his case. That the report having been prepared by the County Director of Agriculture on 30th September, 2021, the Plaintiff/Respondent had 3 years within which to bring a suit before court. That instead, the Plaintiff/Respondent filed the present suit on 28th March, 2025 being over 6 months from the date on which his claim had become stale.
 35. That unlike what the Plaintiff had deponed, that the surveyor had made a supplementary valuation to the original valuation dated 30th August, 2021 and the one dated 29th April 2025 and therefore the case had been filed in time, what mattered was the date of knowledge of the existence of a claim and that the same could not merely be validated by authoring a new report or evidence which material remained the same as those that had earlier been submitted before court by the Plaintiff/Respondent. That the time lapse could not be said to be reasonable time within which the Plaintiff/Respondent had discovered his claim. Reliance was placed in the case of *Mwita & 15 others v Maswi* (Environment & Land Case 239 of 2017) [2023] KEELC 22582 (KLR) (29 December 2023) (Judgment) at Para. 70 and 71 where the court cited the case of *Iga vs. Makerere University* [1972] EA.
 36. His further submission was that the Plaintiff/Respondent having elected to sever his causes of action and to litigate in installment through hierarchical jurisdiction of our courts, and had found himself entangled in limitation of actions hence his entire suit was an abuse of the court process.
 37. On the fourth issue for determination, it was his submission that he was entitled to the prayers sought in the Application for which the court should sustain the application herein.
 38. Lastly, he submitted that by virtue of the provisions of Section 27 of the *Civil Procedure Act*, the court does exercise its discretion in his favour and award him the costs of the suit.
 39. The Plaintiff's Submissions dated 30th June 2025 in opposition to both the Defendants' Applications was that it was clear that although parties in the two cases were the same, the cause of action were different because wherein the first case, he had sought orders of eviction, in the instant case he was seeking compensation which compensation had exceeded the jurisdiction of the trial Magistrate's court which could not handle a claim of more than Kshs. 100,000,000/=. That accordingly, his claim in the instant suit was independent from the earlier case hence he should not be denied his rights by invoking the doctrine of *res judicata*.
 40. That further, the instant suit was not time barred as the issues raised herein were now independent from the issues that had been raised in the earlier case. That indeed, the Agricultural Officer Nakuru County had made a supplementary report dated 29th April 2025 which had brought the action herein to this year. That in any case, the same was just a technical point since a case of a magnitude like the one herein should not be dismissed on technicalities instead, the court should dismiss the same upon hearing the evidence before it. He placed reliance on the provisions of Article 159 (1) (d) of *the Constitution*. That since he was claiming more than Kshs. 100,000,000/=:, it would be unjust to dismiss such a claim merely on technicality before the same was heard.
 41. That whereas both the Defendants had been served with notice to enter appearance and file Defence, they had chosen to file applications to have the suit herein dismissed even before they had filed their appearance and Defence. That in any case, interlocutory judgement had already been applied for



against the said Defendants and that they were in the process of taking a date for formal proof hence the Defendants' applications could not hold.

42. It was thus his submission that the two applications dated 27th May 2025 and 29th May 2025 have no merit and should be dismissed with costs to the Plaintiff/Respondent.

Determination.

43. I have considered the applications herein, the Replying affidavits in opposition, the applicable law and the authorities cited by the parties herein. Pursuant to the filing of the suit where the Plaintiff sought for both a declaration of trespass and significant monetary compensation (damages and mesne profits) from the 1st, 2nd and 3rd Defendants as herein above captioned, in response and vide their respective Notices of Motion dated the 29th May 2025 and 27th May 2025 on a preliminary objection, the Defendants sought to have the Plaintiffs suit struck out and/or dismissed with costs for being Res judicata Nakuru CMELC Suit No. 223 of 2018 and secondly, that the suit is statutory time barred pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act*.
44. That the CMELC Suit No. 223 of 2018 had been between Paul Ngure Waweru vs Smith Mbugua and Patrick Komo Njoroge who were the same parties in the present suit, Gabriel Gitau Komo, the 2nd and 3rd Defendants being an alleged administrator and the son of the 2nd Defendant in CMELC Suit No. 223 of 2018. That previously, the Plaintiff Paul Ngure Waweru had sued the Defendants for having encroached/trespassed on his land L.R. Gilgil/Karunga Block 9/1945 wherein a consent judgement had been delivered on the 21st April 2020 which judgment resolved around parcels of land being Gilgil/Karunga Block 9/1945, Gilgil/Karunga Block 9/1206 and Gilgil/Karunga Block 9/1205. That the present suit was a disguise to seek damages and losses allegedly suffered directly from the same facts and transaction that had been adjudicated in CMELC Suit No. 223 of 2018.
45. That secondly, the matter was statutory time barred pursuant to the provisions of Section 4(2) of the *Limitation of Actions Act*, the cause of action on an alleged tort of trespass having occurred in the year 2000 and ended in the year 2020 and by dint of the report by County Director of Agriculture, Nakuru County dated 30th September 2021.
46. Lastly that the 2nd and 3rd Defendant were one and the same having been sued both on his behalf and as a Personal Representative of the Estate of the deceased; Patrick Komo Njoroge who died on 31st October 2021 despite him not being an Administrator to the estate of Patrick Komo Njoroge (Deceased) therefore he neither had the locus standi nor was he a registered proprietor of parcels of land Nos. Gilgil/Karunga Block 9/1945, 9/1205 and 9/1206.
47. In response and in opposition to the Defendants' Applications, the Plaintiff's argument is that Nakuru CMELC No. 228 of 2018 was founded purely on a boundary dispute while the instant case was for damages and costs for loss, he had incurred which had exceeded the jurisdiction of the Magistrate court. That the two causes of action were therefore different.
48. On the second issue on the suit being time barred, his argument is that the delay in filing the instant suit had been caused by the fact that he had been waiting for the jurisdictions (sic) of the suit referred to above as Nakuru CMELC No. 228 of 2018 and also looking for the money to pay for the legal services. That the Agricultural Officer Nakuru County had made a supplementary report dated 29th April 2025, the surveyor had made a supplementary valuation to the original valuation dated 30th August 2021 and one dated 29th April 2025 which had then brought the action herein within time.
49. Lastly, he had argued that the 1st Defendant had the authority to represent his father because he had been the one who always stood for his father as his personal representative.



50. I thus find the matters arising for my determination being as follows;
- i. Whether the Plaintiff's suit is Res judicata if not;
 - ii. Whether the Plaintiff's suit statutory time barred if not;
 - iii. Whether the Defendants' Preliminary Objection has merit.
51. On the first issue for determination, the Supreme Court of Kenya in *Dina Management Limited vs County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)* held as follows:
- “The doctrine of res judicata was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where res judicata was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. Res judicata, was embodied in section 7 of the *Civil Procedure Act*.
- The elements to be proven before a court could arrive at the conclusion that a matter was res judicata were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.”
52. It must be noted therefore that the doctrine of res judicata is not a mere technicality that can be cured by invoking Article 159 (1)(d) of *the Constitution* but is a matter of substantive law and jurisdiction. It is a pillar of the judicial system that serves the greater public interest in finality and the efficient use of judicial resources.
53. The all-important case decided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696* was clear as to the effect of raising an improper Preliminary Objection in that the court had held thus: -
- “So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
54. In order therefore to decide as to whether this case is res judicata Nakuru CMELC No. 228 of 2018, the court of law as is trite of me, should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.



- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
55. In order to so determine, the Applicants herein in their Notices of Motion annexed the pleadings and judgement in respect of the previous suit so as to show clearly that the suit fell on all fours on the doctrine of res judicata and which annexures I have considered and noted that in CMELC No. 228 of 2018, the parties had been the Plaintiff, Paul Ngure Waweru v Smith Mbugu and Patrick Romo Njoroge- Defendants where the Plaintiff had sought for the following orders;
- a. An order of permanent injunction orders against the Defendants whether by themselves their servants and/or agents from entering, cultivating, trespassing, erecting structures, selling, transferring, alienating and/or interfering with parcel of land known LR Gilgil/Karunga Block 9/1945.
 - b. An order of eviction to issue against the Defendants.
 - c. Cost and interest
 - d. Any other relief that this honorable court deems fit to grant.
56. Subsequently upon hearing the matter, the trial Magistrate in his judgement dated the 21st April 2020, had held that;
- “Parties agreed to have a surveyor visit the ground to determine the boundaries of parcels of land known as LR Gilgil/Karunga Block 9/1945,1205 and 1206 and prepare a report that was done and by consent of the parties the report and findings of the surveyor was adopted as an order of the court.
- The survey process identified and aligned the boundaries of the three parcels of land as per the registry index map to the satisfaction of the parties thereby compromising the suit. The same is adopted as an order of the court.
- Parties are directed to observe and respect the boundaries and occupy only their parcels of land. The defendants shall not encroach on the plaintiff’s land as identified by the surveyor.
- Given the amicable manner in which the matter has been resolved, each party shall bear their own costs.”
57. In the present suit, the Plaintiff, Paul Ngure Waweru has now sued Smith Mbugua and Gabriel Gitau Komo, (both in person and as an administrator of the Estate of Patrick Komo Njoroge Deceased) whom at paragraph 4 (four) of the Plaint, was described as the son to the deceased.
58. In the present suit, the Plaintiff now seeks for the following orders;
- a. “A declaration that the 1st, 2nd and 3rd Defendants trespassed on his land unlawfully.
 - b. Loss of expected crop yield disrupted.....Kshs. (sic) 11,998,800/=.
 - c. Mesne profits for use of his land including the full value of the proceeds of sale or horticultural products by the 1st, 2nd and 3rd Defendants from encroached portion as from January 2000 to the year 2020 amounting to Kshs. 7,955,655/= by the 1st Defendant and Kshs. 57,146,400/= by the 2nd Defendant totaling to Kshs. 65,102,055/=.
 - d. Special damages in the sum of Kshs. 184,220/=.
 - e. General damages.



- f. Costs of the suit together with interest at court's rate.
 - g. Such further and/or other relief that the honorable court may deem fit and just to grant in the circumstances of the suit herein. ”
59. There is no doubt that indeed the parties herein as well as the subject suit were similar in both cases which fact is not denied by the Plaintiff in his response to both the Applications wherein, he had confirmed that whereas Nakuru CMELC No. 228 of 2018 was founded purely on a boundary dispute, the instant case was for damages and costs for loss, he had incurred which had exceeded the jurisdiction of the Magistrate court.
60. It is trite that filing of a subsequent suit for compensation after seeking injunction orders for trespass in the previous suit is restricted and/or barred by legal doctrines such as the principle against "splitting a cause of action" or "litigating in instalments" on the same cause of action popularly known as the principle of Res Judicata.
61. In the previous suit, a consent judgment had determined the matter wherein the Plaintiff had now been barred from filing a second suit for damages based on the same act of trespass. Since both an injunction (to stop the trespass) and damages (to compensate for the harm done) arose from the same cause of action (the act of trespass), they generally constituted a single claim and the Plaintiff cannot therefore sue the same Defendants again on the same cause of action to obtain damages that he had failed to seek in the first suit. It behooved the Plaintiff to include the whole claim and all reliefs he was entitled to in respect of the same cause of action in one suit. By suing only for the injunction, he had forfeited the right to sue for damages later.
62. Indeed, the core statutory provision which generally prohibits a Plaintiff from omitting to sue for any portion of a claim arising from the same cause of action is found in Order 3 Rule 4 of Civil Procedure Rules which provides as follows;
- “(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.
 - (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
 - (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.”
63. The former East African Court of Appeal in *Gurbachan Singh Kalsi v Yowani Ekori* [1958] EA 450 had held as follows;
- “Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”



64. In the same vein, in *Apondi v Canuald Metal Packaging* [2005] 1 EA 12, Waki, J.A. expressed himself as follows:

“A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.”

65. The court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, held that:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

66. Now keeping in mind that in the previous suit, a consent judgment had determined the matter wherein the Plaintiff had now been barred from filing a second suit for damages based on the same act of trespass, and further keeping in mind that the Plaintiff has sued the same parties for damages arising from the same cause of action in the previous suit, and being mindful of attributes of the decisions in the above captioned cited authorities which are binding to this court, and therefore borrowing a leaf from the already pronounced decisions on the mantra that a party cannot escape the doctrine of *res judicata* by simply undertaking a cosmetic surgery to his pleadings by merely adding other parties or causes of action in a subsequent suit, I find and hold that the Plaintiff herein cannot prosecute a fresh suit in respect of the same cause of action to obtain damages that he had failed to seek in the first suit. His current suit vide his Plaint dated the 24th February 2025 is therefore incompetent and bad in law by virtue of being *res judicata* CMELC No. 228 of 2018 and I therefore need not make a determination of the other issues herein above stated but to strike out the suit with costs which I now do.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 9TH DAY OF OCTOBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

