

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC CASE No. E006 OF 2022

CHRISTOPHER KIPROTICH TELENGECH PLAINTIFF

VERSUS

LORNHO AGRIBUSINESS (EA) LTD 1ST DEFENDANT

BENJAMIN BETT 2ND DEFENDANT

ABRAHAM CHERUIYOT 3RD DEFENDANT

STEPHEN RONO KIPKORIR 4TH DEFENDANT

RICHARD SAWE 5TH

DEFENDANT

THE LAND REGISTRAR,

UASIN GISHU COUNTY 6TH

DEFENDANT

THE COUNTY SURVEYOR,

UASIN GISHU COUNTY 7TH DEFENDANT

JUDGMENT

1. This matter was commenced by way of a Complaint dated and filed on 26th January, 2022. In his Complaint, the Plaintiff pleaded that vide letter of allotment dated 9th December, 2003, the 1st Defendant allocated 37 Acres of land to him. He averred that the 37 Acres were to be excised out of the parcel of land identified as SOY/SOY BLOCK 10(NAVILLUS)/27. That upon subdivision, the portion due to the Plaintiff was identified as SOY/SOY BLOCK 10(NAVILLUS)/1423 (the suit property). He averred that he paid for the land, developed it, occupied and made use of it immediately.

2. The Plaintiff averred that on or about 10.11.2021, the 1st-5th Defendants with the assistance of the 6th and 7th Defendants fraudulently subdivided his land without his consent. He set out the particulars of the alleged fraud as sub-dividing the land without his consent, sub-dividing the land without Land Control Board (LCB) Consent and/or order of the court and processing titles knowing that he was the proprietor of the land. The Plaintiff acknowledged that there had been a previous suit between himself and the 1st - 4th Defendants, being Eldoret ELC No. 308 of 2018 which was dismissed for non-attendance, but which was in relation to further acreages and not the 37 Acres sought herein.
3. Arising out of the above, the Plaintiff now seeks the following reliefs from this court:-
- (a) An order of permanent injunction restraining the defendants jointly and severally, by themselves, their agents or servants from entering, trespassing, leasing, or in any way dealing with the Plaintiff's parcel of land known as SOY/SOY BLOCK 10(NAVILLUS)/1423, on the resultant titles.
 - (b) An order of injunction restraining the issue of new title Numbers over SOY/SOY BLOCK(NAVILLUS)/1423 and consolidation thereof into SOY/SOY BLOCK 10(NAVILLUS)/1423, and the cancellation of any new title issued, if any.
 - (c) A declaration do issue that the interference by the Defendants with the plaintiffs ownership of title to SOY/SOY BLOCK 10(NAVILLUS)/1423 is illegal and amounts to trespass.
 - (d) Damages for trespass.
 - (e) Costs of the suit and interest at the Court rates.
 - (f) Any other relief that this honourable court shall deem fit to grant.

4. The 1st - 5th Defendants entered Appearance through the firm of Mandere Nyandoro & Company Advocates. They later changed to Nelson Otieno & Associates Advocates, through which the 1st & 5th Defendants filed a joint Statement of Defence dated 9th May, 2023 denying the allegations set out in the Plaintiff. They denied that the Plaintiff was the owner of the suit property. They claimed instead that the 1st Defendant is the absolute registered owner of Soy/Soy Block 10(Navillus)/27, which they claimed to be the suit property. That at the time of subdivision of the 1st Defendant's land to the 2nd - 4th Defendants, the land was still in its name and at no point had it been sold to the Plaintiff, neither was there any form of encumbrance to the land. They averred that the transaction leading to the sale, subdivision and transfers to the 2nd - 4th Defendants followed due process, was lawful and unquestionable.
5. The 1st Defendant denied entering into any agreement for sale of land with the Plaintiff and clarified that the only people it sold land to were the 2nd - 4th Defendants. The 1st & 5th Defendants averred that the fraud allegations are a non-starter since no factual basis had been laid and no evidence had been filed before this court. The 1st & 5th Defendants asked the court to dismiss the suit with costs and interest, and also asked for the following reliefs:-
- (i) A declaration do issue that Land Parcel No. SOY/SOY BLOCK 10(NAVILLUS)1423 belongs to the 1st Defendant herein.
 - (ii) A permanent injunction restraining the Plaintiff, either by himself, his agents, assigns or anyone working under his control, from interfering with land parcel no. SOY/SOY BLOCK 10(NAVILLUS) 1423.
 - (iii) General damages for trespass into land parcel no. SOY/SOY BLOCK 10(NAVILLUS) 1423.
6. The 3rd Defendant filed a separate Statement of Defence through the same firm dated 9th May, 2023. He also denied the allegations in the Plaintiff, and claimed

that he had never been a party to any transaction between the Plaintiff and the 1st Defendant. He averred that the allegation that he illegally subdivided the suit property is incorrect and aimed at maligning his name. He claimed that he legitimately and legally bought land parcel no. Soy/Soy Block 10(Navillus)1424 and has nothing to do with Soy/Soy Block 10(Navillus)/1423. The 3rd Defendant accused the Plaintiff of trespassing into his land (parcel 1424) and interfering with the beacons and crops planted thereon.

7. The 3rd Defendant denied the particulars of fraud and urged that the suit is misconceived. He further averred that the Plaintiff had shown no proof of illegality in acquisition of parcel no. 1424 to warrant cancellation of the title. That instead, the Plaintiff has laid bare his intention to illegally take possession of the 3rd Defendant's land, being parcel no. 1424. The 3rd Defendant asked the court to protect his proprietary rights to parcel no. 1424. He termed the claim for damages for trespass against him far-fetched and without reasonable justification, and thus should be dismissed with costs and interest. The 3rd Defendant instead sought the following orders against the Plaintiff:-
- (i) A declaration do issue that Land Parcel No. SOY/SOY BLOCK 10(NAVILLUS)1424 belongs to the 3rd Defendant herein.
 - (ii) A permanent injunction restraining the Plaintiff, either by himself, his agents, assigns or anyone working under his control, from interfering with land parcel no. SOY/SOY BLOCK 10(NAVILLUS) 1424.
 - (iii) General damages for trespass into land parcel no. SOY/SOY BLOCK 10(NAVILLUS) 1424.
8. The Attorney General appeared on behalf of the 6th & 7th Defendants and opposed the claim through a joint Statement of Defence dated 25th March, 2022. The 6th and 7th Defendants denied any knowledge that the Plaintiff was the bonafide owner of the suit property, or that he took possession thereof. They

also denied the alleged interference or encroachment by the Defendants or that the sub-division of the land was fraudulent as alleged, and denied any negligence attributed to them in the performance of their statutory duties.

9. The 6th and 7th Defendants also denied conspiring with the 1st - 5th Defendants to create illegal sub-divisions and mutations on the suit land, and specifically denied the particulars of fraud pleaded. They contended that they acted on duly executed instruments lodged for action, and merely implemented instructions from the 1st Defendant who is the proprietor. They claimed that the sub-divisions were done in good faith and upon certifying that the necessary completion documents were duly executed and availed, and also upon compliance with procedural requirements.
10. The 6th and 7th Defendants urged that they acted bona fide and were not privy to the independent transactions between the parties herein, thus they ought not be blamed if the Plaintiff did not sanction the sub-divisions. They claimed that there is no cause of action disclosed against them. They termed the suit fatally defective for want of compliance, untenable, statute barred and inter alia bad in law as it raises no cause of action known in law, and asked that it be dismissed with costs.

Hearing and Evidence

The Plaintiff's Case

11. Hearing of the suit commenced on 8th November, 2023 with the Plaintiff testifying under oath as PW1 and he adopted his witness statement as his evidence-in-chief. He testified that in the year 2007 the 1st Defendant allocated him the parcel of land known as Soy/Soy Block 10(Navillus)27 measuring 100 Acres, and gave him a letter authorising him to take possession. He testified that he paid for the land through Standard Chartered Bank A/c No. 0104017421600

and produced a bundle of banking slips and receipts as PEXb1. He said that one Acre was going for KShs. 28,000/- and he paid a first instalment of KShs. 1,040,000/- which covered 37 Acres. That he later made a further payment of KShs. 769,000/- which covered an additional 28 Acres.

12. PW1 testified that the land was subdivided to give him the 37 Acres he had earlier paid for, which he still lives on, and was also given a letter authorising him to process title thereof. He produced a letter dated 9th December, 2003 as PEXb2. He testified that the other portion was given to other parties. He testified that he was in court seeking title to the 37 Acres now comprised in Title No. Soy/Soy Block 10(Naillus)1423, which the County Government of Uasin Gishu seeks to survey, and he produced a letter from the Surveyor as PEXb3. He also produced a letter from the Company authorising him to occupy the land as PEXb4.
13. PW1 explained that the 2nd Defendant is the one who sold the land to him on behalf of the company. He also said that he had sued the 3rd and 5th Defendants for encroaching into his land. He testified that he had a search showing that the land is still in the name of the 1st Defendant and he produced it as PEXb 5. He told this court that the 1st Defendant wound up and left the country. He also produced a map which shows the location of the suit property and parcel no. 1422. He asked that the prayers in the plaint be allowed, and also asked for a title in his name, and that the beacons be put in place as well.
14. When PW1 was cross-examined by Mr. Onyiego counsel for the 1st - 5th Defendants, he reiterated that the 1st Defendant is still the owner of the suit land. He testified that he had no sale agreement showing he bought 100 acres from the 1st Defendant, but he stated that he paid for 37 Acres and was given two letters, PEXb 2 & 4 which allowed him to take possession of the land. He admitted that

he did not get the 100 Acres because he did not complete the payment. That although he paid for 65 Acres, he only got 37 Acres. He added that he had sued the 5th Defendant since he claimed to be a director of the 1st Defendant.

15. PW1 confirmed that the suit land was previously known as Soy/Soy Block 10(Navillus)/27 but it was subdivided in 2002. He also admitted that only an owner of land can call for subdivision. With regard to PEXb 2 and 3, he admitted that both letters were not addressed to him. He conceded that he never took any documents to the Lands Office to get title for the suit land. PW1 was referred to PEXb 2 and testified that the letter states that he bought the land.
16. On re-examination, PW1 reiterated that he purchased 37 Acres out of Soy/Soy Block 10(Navillus)/27, alongside Abraham Kiptabut Yego and Stephen Rono Kipkorir who also purchased portions thereof. This marked the end of his testimony and the close of the Plaintiff's case.

The 4th Defendants' Case

17. The 4th Defendant, Stephen Rono Kipkorir, testified as DW1 and adopted his witness statement dated 9th February, 2024 as his evidence-in-chief, and produced the documents in his list of documents filed on 19th February, 2024 as 4th Defendant's EXb1 - 10. He denied knowing the Plaintiff or interfering with his land.
18. On cross-examination by Dr. Chebii, learned counsel for the plaintiff DW1 testified that he entered the land in 2001 after it was subdivided and after the Plaintiff had failed to pay for the 100 Acres. He testified that he purchased 54 Acres of Soy/Soy Block 10(Navillus)/27 on condition that it would be adjusted. That he was given an occupation certificate which did not mention the adjustment, but insisted that the land was in fact adjusted. He testified that he

and his neighbour Abraham Kiptabut have title to their portions. DW1 said he had never seen PEXb2.

19. DW1 testified that he was supposed to get 20.4 Ha, and that his title indicates he has 21.4 Ha for which he paid KShs. 1.8 Million, and his land is parcel no. 1422. He told the court that he was claiming an additional 27 Acres from the suit property, but was unaware that the Plaintiff was claiming an additional 28 Acres. He was referred to DEXb10 and testified that the case was dismissed because the Plaintiff was not present in court. He testified that the Plaintiff had been giving him trouble since he entered the land but he did not know if the Plaintiff had a letter of allotment. The court however made a note that DW1 was evasive and avoided answering questions.
20. DW1 was also cross-examined by Ms. Odeyo learned counsel for the 6th and 7th defendants and testified that he occupies Parcel No. 1422 which was originally Parcel No. 27, and which belonged to the 1st Defendant. That it is the 1st Defendant who subdivided the land and presented documents for subdivision. He denied moving the Land Registrar to have a portion of the suit property. He also testified that he had never been charged in any fraud touching on the land. He clarified that the Land Registrar relied on the documents presented to him.
21. DW1 was also cross-examined by Ms. Shejero counsel for the 1st, 3rd and 5th defendants and he admitted that there was a boundary dispute between him and the Plaintiff. He further testified that the Plaintiff had not been charged with any fraud case. He told this court that he knew Richard Kiptum Sawe as a director of the 1st Defendant.

22. He was re-examined and testified that the suit land belongs to the 1st Defendant and the subdivision was to ensure he got the 27 Acres which he was entitled to. This marked the close of the 4th Defendant's case.

The 1st, 3rd and 5th Defendants' Case

23. Abraham Kiptabut Yego testified as DW2 and adopted his witness statement dated 9th May, 2023 as his evidence-in-chief. He also produced the documents in his list of documents of even date as 3rd Defendant's EXb 1-9 respectively. He testified that they did not trespass and subdivide the Plaintiff's land. He testified that his land is parcel no. 1424 and he has a title deed in his name for that land. DW2 admitted that parcel no. 1423 belongs to the Plaintiff and he had not interfered with it. DW2 testified that he did not grab anyone's land and prayed for costs of the suit.

24. He was cross-examined by Ms. Odeyo and he reiterated that the suit land belongs to the Plaintiff. That parcel no. 1423 has no title but the land belongs to the 1st Defendant.

25. On cross-examination by Mrs. Khayo, DW2 testified that he is the owner of Parcel no. 1422 and has lived on it for 25 years. He testified that that the 1st Defendant gave him his title deed to parcel no. 1422. He told this court that the 4th Defendant is his neighbour who owns parcel no. 1424. He testified that he bought his land from the 1st Defendant.

26. When he was cross-examined by Dr. Chebii, DW2 testified that he paid KShs. 825,000/- for his land at KShs. 28,000/- per acre. He testified that he received a letter dated 7th August, 2000 showing that he purchased parcel no. Soy/Soy Block 10(Navillus)/27. As to the difference in names, DW2 testified that people refer him as Cheruiyot but it is not his real name. DW2 testified that he could

not tell that his letter was changed from 15 Acres to 19 Acres. The court noted that it had seen the change from 15 Acres to 19 Acres. DW2 further testified that he had 19 Acres on his title deed, and denied having 4 Acres belonging to the Plaintiff.

27. DW2 testified that the surveyor went to the land because the Plaintiff had trespassed on 2 Acres of his land, which the Plaintiff ploughs and has even sold part of it. DW2 further testified that he reported the matter to the Police and the Plaintiff was arrested and charged. He disputed the information in the letter dated 7th August, 2000 that states he bought 15 Acres. He however admitted that the 15 Acres was typed while ink was used to write 19 Acres.
28. On being re-examined, DW2 testified that the 1st Defendant transferred the 19 Acres to him. DW2 denied taking the Plaintiff's land, and said that it is in fact the Plaintiff who had taken his 2 Acres. He testified that he followed the right procedure to get the title to his land.

The 6th and 7th Defendants' Case

29. On behalf of the 6th & 7th Defendants, Naomi Rop, a Land Registrar in Uasin Gishu County testified as DW3. She produced the green card for Soy/Soy Block 10(Navillus)/1423 as DEXhb10. She testified that the register was first opened 24th September, 2002 in the name of Lourho Agribusiness (E.A.) Ltd. She explained that the suit property was a subdivision of parcel no. 27. She explained that entry no. 2 on the register is a caution placed by the Plaintiff claiming purchaser's interest.
30. DW3 stated that she had no knowledge of the agreement between the Plaintiff and the 1st Defendant. She testified that she had never received transfer documents in favour of the Plaintiff prior to 2002. That the documents were

presented in April, 2025, but the same are yet to be registered. She added that all the entries made were made on the strength of documents presented to them.

31. DW3 was cross-examined by Ms. Shejero upon which she reiterated that the land belonged to the 1st Defendant and that the caution came after the suit was filed. She testified that transfer documents from the Plaintiff came in April, 2025, three years after the suit was filed, but have not been registered.
32. DW3 was then cross-examined by Dr. Chebii and she testified that the purpose of the letter dated 3rd November, 2021 was to establish the boundaries of parcel nos. 1422, 1423 and 1424, and to subdivide parcel no. 1423. She reiterated that she received transfer documents over the suit land from Lourho in favour of the Plaintiff. Further, that to her knowledge, no other person was claiming the suit land except for the Plaintiff and the 1st Defendant. She confirmed that the suit land measures 14.97 Ha which is equal to 37 Acres. DW3 told this court that DEXb3 was addressed to the occupants of parcel nos. 1422 and 1424, but not the occupant of parcel no. 1423.
33. DW3 also testified that the transfer has not been registered because there is a caution. She explained that under Section 73(1) of the Land Registration Act, a caution may be removed by the cautioner, by the court or by the Land Registrar after conducting a caution hearing. She also told the court that a document of withdrawal of caution was lodged on 21st March, 2025 by the cautioner, who is the Plaintiff herein, but it was not removed because he did not attach copies of his ID and KRA Pin. She confirmed that once these documents were presented, the caution would be removed and the transfer registered.
34. During cross-examination by Ms. Khayo, she testified that the suit property has not been subdivided. She clarified that the surveyor prepares mutation forms for

subdivision and the Land Registrar registers the mutation, but it is the registered owner who instructs. She however testified that she was not aware of any documents for subdivision of the suit land, or any complaint regarding the boundary thereof. She stated that she did not have the green card for parcel no. 27 so she could not tell the number of subdivisions therefrom.

35. When she was re-examined, DW3 denied authoring DEXb3 and thus could not comment on it as it was not copied to the land registrar. She concluded by saying that according to the green card, the 1st Defendant is the current registered owner of the suit property.

Submissions

36. At the close of the hearing, the court directed parties to file their final Submissions. In compliance with the court's directions, the Plaintiff filed his submissions dated 19th May, 2025 through the firm of Chebii & Co. Advocates. The firm of NAM Festus filed submissions dated 15th August, 2025 on behalf of the 1st to 5th Defendants. The 4th Defendant also complied and filed his submissions dated 11th August, 2025.

Plaintiff's Submissions

37. In the Plaintiff's submissions, Counsel started by summarising the pleadings and the evidence. He then submitted that once a letter of allotment is issued and the terms therein complied with, the land is no longer available for allotment. Counsel submitted that there is no evidence that the Plaintiff's letter of allotment and letter of occupation were cancelled or revoked, thus they remain valid and the surveyor's letter of 3.11.2021 cannot supersede them. Counsel further argued that no evidence was tendered to show that the 4th Defendant is entitled to an extra 27 Acres, whereas the Plaintiff proved that he had been allotted the suit land measuring 37 Acres.

38. Counsel explained that the 3rd and 4th Defendants were allotted 19 Acres and 54 Acres respectively, which together with the Plaintiff's land makes up the 110 Acres that were comprised in Parcel No. 27. Counsel further argued that the illegal subdivision of the suit property by the Defendants is not justified. Further, that the Plaintiff has a right to immediate possession of the suit land, which he had occupied since 2000. He asked for general damages to the tune of KShs. 600,000/-. He asked that the Plaintiff be awarded costs and interest.
39. To support his arguments, Counsel relied on *Rukaya Ali Mohamed vs David Gikonyo Nambahca HCCA No. 9 of 2014*, *Benja Propertioes Limited vs Syedna Mohammed Burhannudin Sahed & 4 Others (2015) eKLR*, *Janet Kaphiphe Ouma & Another vs Marie Stoppes International (K) Limited, Kisumu HCCC No. 68 of 2007*, *Kenya Power and Lighting Company Limited vs Shariff Molana Habib (2018) eKLR* and *Duncan Nderitu Ndegwa vs KPLC & Another (2013) eKLR*.

The 1st - 5th Defendants' Submissions

40. On his part, Counsel for the 1st to 5th Defendant started by citing Section 7 of the Civil Procedure Act and submitted that the issues in this suit were in dispute in the Plaintiff's first suit, that is ELC 223 of 2000, and were thus heard and finally determined. Counsel submitted that the suit is not only res judicata, but is also an abuse of the court process. He relied on *ET vs Attorney General & Another (2012) eKLR* and *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR*.
41. Counsel also submitted that the Plaintiff paid for 37 Acres and was given a licence for temporary use as the land was not transferred to him. Counsel thus argued that the Plaintiff's claim over the suit land is legally untenable as he

cannot claim ownership over land sold to bona fide purchasers. Counsel submitted that the suit does not disclose any actionable wrong against the 2nd - 4th Defendants. He added that the 3rd & 4th Defendants own parcel nos. 1422 & 1424 and have valid, indefeasible titles thereto protected under Section 24 and 26 of the Land Registration Act. Counsel was of the view that the Plaintiff had not alleged or presented evidence of any fraud or irregularity in the transfer of these parcels.

42. Counsel faulted the Plaintiff for seeking ownership of land without paying the full purchase price, and that having so defaulted, no wrongdoing could be alleged against the 1st - 5th Defendants. Counsel argued that the reliefs sought in the Plaint can only be granted where a claimant has established a legal or equitable right, conditions the Plaintiff had not satisfied, and thus he is not entitled to them. For these reasons, the 1st - 5th Defendants asked that suit be struck out for lack of merit, the 3rd and 4th Defendants' title over parcel no. 1422 and 1422 be affirmed and the Plaintiff be declared to have no proprietary rights over the suit land.

4th Defendant's Submissions

43. Counsel for the 4th Defendant argued that the Plaintiff's claim is barred under Section 7 of the Limitation of Actions Act since the Plaintiff seeks to recover land after 12 years after the alleged allocation in 2003, thus the reliefs sought cannot issue.
44. On the alleged fraud, Counsel submitted that the Plaintiff failed to comply with Order 2 Rule 10 of the Civil procedure Act which requires allegations of fraud to be specifically pleaded and strictly proved. Counsel argued that no particulars or supporting evidence of fraud were presented before the court, and further that there was no evidence that the suit property was subdivided at all. Counsel

submitted that Soy/Soy Block 10(Navillus)/27 was subdivided in 2002 to create parcel nos. 1422, 1423 and 1424 and no further subdivision was done in 2021.

45. Counsel for the 4th Defendant submitted that the plaint, Plaintiff's statement and the testimony are not in tandem. That parties are bound by their pleadings and the Plaintiff was to present facts to support the Plaint. He urged that the Plaintiff had not done so, and therefore the Plaintiff had not proved his case as required at Sections 107(1)(2) and 112 of the Evidence Act. In addition, Counsel argued the Plaintiff's claim for trespass against the Defendants was not proved either. Counsel therefore prayed that the case be dismissed with costs.
46. Counsel cited the following cases in support of the above arguments; *Iga vs Makerere University (1972) EA*, *Gichinga Kibutha vs Caroline Nduku (2018) KLR*, *Vijay Morjaria vs Nansingh Madhisingh Darbar & Another (2000) eKLR*, *David Sirona Ole Tukai vs Francis Arap Muge & 2 Others (2014) eKLR*, *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (2018) eKLR*, *Independent Electoral and Boundaries commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR*.

Analysis and Determination

47. I have considered the pleadings herein, the witness testimonies and the evidence adduced. I have also read the submissions filed by the parties and the authorities cited. The issues that arise for consideration are as follows:-
- i. *Whether the suit herein is res judicata*
 - ii. *Whether the Plaintiff's claim is barred by Section 7 of the Limitation of Actions Act*
 - iii. *Whether the Defendants trespassed onto Plaintiff's the land*
 - iv. *Whether the Plaintiff is entitled to the orders sought*
 - v. *Who shall bear the costs of this suit?*

48. I must point out that although the 1st - 5th Defendants initially entered appearance jointly, the Advocate on record at the time only filed a joint statement of defence on behalf of the 1st and 5th Defendants. The same Advocate later filed a Statement of Defence on behalf of the 3rd Defendant. However, no Statement of Defence was ever filed on behalf of the 2nd and 4th Defendants.
49. The 2nd and 4th Defendant's failure to file a defence and to tender evidence at the trial means that the allegations that were made against them in the plaint were not denied. However, since no default judgment was entered against them, the 2nd and 4th Defendants and their advocates attended the hearing and cross-examined the witnesses, and the 4th Defendant testified in court. This court has therefore rendered its decision herein-below on merit of the case.

(a) Whether the suit herein is res judicata

50. The Defendants claim that the instant suit is res judicata courtesy of an earlier suit filed by the Plaintiff being HCCC No. 223 of 2000. From the documents produced in court regarding this suit, it is evident that it was commenced in the high court and was later transferred to the ELC and registered as ELC No. 308 of 2017.
51. It has been claimed that the issues raised in this suit were in issue in the previous suit, and that those issues were heard and a final determination rendered. Consequently, by virtue of the said ELC 308 of 2017, the instant suit offends Section 7 of the Civil Procedure Act, which provides that:-

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they

or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

52. From the above provision, for a party to be able to rely on the defence of *res judicata* they must demonstrate that:
- (a) *The suit or issue was directly and substantially in issue in the former suit.*
 - (b) *That the former suit was between the same parties or parties under whom they or any of them claim.*
 - (c) *Those parties were litigating under the same title.*
 - (d) *The issue was heard and finally determined in the former suit.*
 - (e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*
53. See also the case of ***Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) KECA 477 (KLR)***, where the Court of Appeal held that for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, all the above elements must be satisfied, as they are rendered not in disjunctive, but conjunctive terms.
54. I have had an opportunity to look at the Plaintiff filed by the Plaintiff herein in ELC 308 of 2017. In the previous suit, the Plaintiff claimed to be entitled to the entirety of the parcel of land known as Soy/Soy Block 10(Navillus)/27, and which he claimed had been fraudulently sold to the Defendants in that suit. The Court Order dated 14th August, 2018 shows that the said suit was on 25th July, 2018 dismissed for non-attendance by the Plaintiff.
55. This means that the suit was never heard and a final determination rendered on the issues raised therein. The fact that the Plaintiff's suit was dismissed for

non- attendance does not mean that the suit was determined on its merit and with finality as alleged by the Defendants, neither does the dismissal of his application for reinstatement of the suit.

56. In any event, the cause of action that gave rise to this instant suit arose in the year 2021 when the Defendants are alleged to have trespassed into the Plaintiff's land and purported to subdivide it without his knowledge or consent. The issue of the alleged attempt to subdivide the suit land was not raised in the previous suit, which for the record was dismissed in 2018 before the events complained of herein. The present suit herein does not therefore offend the doctrine of res judicata as codified at Section 7 of the Civil Procedure Act.

(b) Whether the Plaintiff's claim is barred by Section 7 of the Limitation of Actions Act

57. There was also the submission that the present suit offends Section 7 of the Limitation of Actions Act. Notably, this claim was not raised in the pleadings, and neither was it proved by way of any evidence or testimonies. It is trite that parties are bound by their pleading, and in this instance, none of the Defendants raised the issue of limitation in their various Defences filed herein.

58. In the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi and Another (2014) eKLR*, the court observed as follows: -

“... submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties, “marketing language”, each side endeavouring to convince that this case is the better one. Submissions we reiterate do not constitute evidence at

all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”

59. The claim that the suit is subject to limitation under Section 7 was only raised in the 4th Defendant’s final submissions. In my view this amounts to trial by ambush since it did not allow the Plaintiff an opportunity to respond to the issue. None of the Defendants led evidence to this effect.
60. In any event, DW3 testified that the 1st Defendant had since lodged a transfer in favour of the Plaintiff in April, 2025. This action effectively is acknowledging the Plaintiff’s claim over the land, thereby defeating the limitation under Section 7 of the Limitation of Actions Act. For this reason, the defence that the suit is statutorily barred fails.

(c) Whether the Defendants trespassed onto the Plaintiff’s land

61. In this case, the Plaintiff presented a claim of trespass to land against the Defendants. He averred that the Defendants entered his land on 10th November, 2021 with the intention of subdividing it without his knowledge and/or consent. This court is thus called upon to determine whether the Defendants indeed trespassed onto the suit property.
62. Section 3 of the Trespass Act defines trespass to land as follows:-
- 3. Trespass upon private land***
- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.***

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

63. In Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923, trespass to land is defined as follows:

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. If the Defendant place a foot on the Plaintiff’s land unlawfully, it is in law as much a trespass as if he had walked on half a mile on it.”

64. As to who may sue for trespass, a further discussion is found at page 927 thereof, as follows:-

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

65. Courts have applied these principles on trespass, and in the case of *Charles Ogejo Ochieng vs Geoffrey Okumu (1995) eKLR*, the court held that:

“Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass.”

66. To establish trespass, the Plaintiff must prove that he is either lawfully in possession of the property or that he has a right to immediate and exclusive occupation of the land. It follows that the Plaintiff herein must establish ownership or right to occupy the land to sustain a claim for trespass.

67. In this case, the Plaintiff insists that he is the owner of the suit property having purchased the same from the 1st Defendant. The Plaintiff claims that although the land is yet to be transferred to him, he duly paid for it and produced bank deposit slips and receipts issued by the 1st Defendant with regards to payments he made for the land.
68. This court has been presented with a Certificate of Official Search indicating that the suit property is currently registered in the name of the 1st Defendant. This is supported in the entries in the Green Card produced in court as DEXb10. The letter dated 22nd March, 2001 from EATEC, which is the predecessor in title of the 1st Defendant, confirms that the Plaintiff herein had purchased 37 Acres of Soy/Soy Block 10(Navillus)/27.
69. Going by the letter dated 9th December, 2003 signed by one D.K. Korir, the 1st Defendant's Property Sales Manager, it appears that the property known as Soy/Soy Block 10(Navillus)/27 measuring 110 Acres was purchased by three people. Christopher Telengech, the Plaintiff herein purchased 37 Acres, Stephen Rono Korir, the 4th Defendant, purchased 54 Acres whilst Abraham Kiptabut Sawe, the 3rd Defendant bought 19 Acres. The letter further states that the said parcel was subdivided into 3 portions in the names of the three aforementioned individuals, and there is a Mutation Form dated 26th August, 2002 confirming the sub-division.
70. All these documents prove that indeed the Plaintiff has an interest in the land arising out of the purchase which is acknowledged in the letter of 9th December, 2003 and supported by the Plaintiff's payment records. In addition, DW2 testified that parcel no. 1423 belongs to the Plaintiff.

71. That aside, the Plaintiff's interest in the suit land is further crystallised by the fact that the 1st Defendant has since executed transfers in his favour, which transfers were lodged at the land registry in April 2025 and are awaiting registration. DW3 explained to this court that the reason the transfer is not yet registered is because of the caution lodged by the Plaintiff.
72. DW3, however, admitted that the Plaintiff, who lodged the caution, had lodged a withdrawal of caution on 21st March, 2025. Presumably therefore, upon supply of the relevant documents, being his ID and KRA Pin, then the caution will be removed and the transfers lodged in April, 2025 will be registered in the Plaintiff's favour. In the circumstances, I am convinced that the Plaintiff is indeed a beneficial owner of the suit property herein, and therefore he has a beneficial interest in the land and is entitled to immediate possession thereof.
73. Since trespass has been defined as unjustifiable entry into another person's land, the next question is whether there was any justifiable reason for the Defendants to enter the Plaintiff's land. The Plaintiff has produced the letter dated 3rd November, 2021 from the Ministry of Lands, Uasin Gishu County Survey Office with the subject "Boundary Re-establishment of Parcels Soy/Soy Block 10(Navillus)/1422, 1423 and 1424."
74. The letter is addressed to the Chief, Soy Location informing him that a team of surveyors would be visiting the said parcels on 10/11/2021 to re-establish common boundaries among the said parcels and to sub-divide parcel no. 1423. Notably, the letter is copied to the 4th Defendant and the occupants of Parcel Nos. 1422 and 1424. Although the Plaintiff is the occupier and beneficial owner of the suit land, he was never informed of the intended subdivision exercise. The Plaintiff is therefore correct to say that the exercise was being undertaken without his knowledge and consent.

75. DW3 told this court that although the surveyor prepares mutation forms for subdivision and the Land Registrar registers the mutation, instructions for subdivision must emanate from the registered owner. In this case, there is no evidence that the 1st Defendant, who is the current registered owner of the land, ever applied for or sanctioned any subdivision of the suit property.
76. Furthermore, the letter dated 9th December, 2003 was clear on the sizes purchased by the Plaintiff, the 3rd & 4th Defendants. There is no other document showing that the parcels purchased by the 3rd and 4th Defendants were increased thereafter as to entitle them to portions that were to be excised from the Plaintiff's land.
77. Additionally, DW3 testified that the Land Registrar has jurisdiction over boundary disputes. I do agree with the Land Registrar, since Section 18 of the Land Registration Act bars the court from determining a boundary dispute unless the same has first been submitted for determination to the Land Registrar. In this case however, the Land Registrar was unaware of any boundary dispute regarding the suit property. DW3 denied authoring DEXb3, the letter dated 3rd November, 2021 informing the chief and the Defendants of the intended subdivision and re-establishment of boundaries, and she also could not comment on it as it was not copied to the land registrar. It is therefore not clear what boundary dispute the surveyor was dealing with and what jurisdiction he was acting on.
78. From the foregoing, it is clear that there was no justifiable reason why the 1st - 5th Defendants and the 7th Defendant's officers entered the Plaintiff's land to either re-establish any boundary or to subdivide the suit property. I exclude the 6th Defendants herein from culpability because there is no proof that the office of

the Land Registrar participated in this exercise. As DW3 stated in court, the letter announcing the date of the survey was not copied or addressed to the Land Registrar's Office. Consequently, the Plaintiff is right in his assertions that the Defendants trespassed into the suit property.

(d) Whether the Plaintiff is entitled to the reliefs sought

79. Having found that the 1st - 5th Defendants and 7th Defendants trespassed into the Plaintiff's land, the next step is to determine whether the Plaintiff is entitled to the reliefs sought in the Plaint. The Plaintiff first sought an order of permanent injunction restraining the defendants from entering, trespassing, leasing, or in any way dealing with the suit property on the resultant titles.

80. In the case of *Paul Audi Ochuodho vs Joshia Ombura Orwa (2014) eKLR*. Okong'o J stated that:-

“The defendant having been proved to have entered the suit property without the permission of the proprietor or any lawful cause, the defendant is a trespasser on the suit property and the plaintiff is entitled to judgment against the defendant for an injunction to restrain the defendant from committing further acts of trespass. The plaintiff is also entitled general and special damages arising from such trespass.”

81. In the present case, the Plaintiff has proved that he has a beneficial interest in the suit land. The Defendants have no right to enter the suit land or interfere with the Plaintiff's ownership. The Plaintiff is entitled to the prayer for permanent injunction sought in the Plaint.

82. At prayer (b) of the Plaint, the Plaintiff asked for an order of injunction restraining the issue of new title Numbers over the suit property. Under this prayer, the Plaintiff also asked for consolidation of the land back into

SOY/SOY BLOCK 10(NAVILLUS)/1423, and the cancellation of any new title issued.

83. The Land registrar informed this court that the land has not been subdivided. I note from the copy of the green card that the Plaintiff lodged a Caution against the title on 2nd February, 2022. In addition, on 15th March, 2022 the Plaintiff obtained an order of temporary injunction barring the Defendants from entering into or interfering with his possession pending determination of the suit. Since the subdivision has not been done, it is unlikely in the circumstances that there are any new titles issued over the suit land.
84. However, I note that the caution was lodged almost 3 months after the survey exercise of 10th November, 2021. In addition, the Land Registrar was not aware if there were any subdivision forms for the suit property. Given this uncertainty, there is a possibility that the Defendants may have indeed progressed in their endeavour to have the suit property sub-divided. For this reason, I will also allow the said prayer of the plaint.
85. The Plaintiff also claims damages for trespass. On damages, in *Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited (2017) KECA 358 (KLR)*, the Court of Appeal stated that once trespass is proved, the affected party need not prove that it suffered any damages or loss to be awarded damages. The court is bound to award damages depending on the facts of each case.
86. Similarly, in the case of *Bhagwani Singh Kalsi vs National Housing Corporation (2017) KEELC 391 (KLR)*, it was held as follows:-
- “The question of general damages for trespass is well settled. Once trespass is established or proved, then a party need not prove that he**

suffered any damage or loss. It is trite law that trespass to land is actionable per se. The plaintiff prayed for general damages for the loss occasioned by the defendant who had encroached on his suit land. Having determined that the defendant is a trespasser it follows that it should pay damages. It is at the discretion of the court to assess the reasonable damages to be awarded to the plaintiff. The court can take into account amongst other factors the length of time of the illegal occupation, nature of the trespass and whatever the trespasser was doing on the land. The discretion must however be exercised judiciously to meet the ends of justice.”

87. In this regard, the Plaintiff asked for KShs. 600,000/- as damages for trespass. I note however that although the Defendants went into the Plaintiff’s land, they did not occupy it for an extended period of time. Their intention as stated in the letter of 3rd November, 2021 was to re-establish the boundaries and subdivide it.
88. The Plaintiff obtained a temporary injunction in this suit which has ensured that the Defendants do not interfere with his possession of the suit land, and is further protected by the Caution he lodged against the title. For this reason, I am of the view that KShs. 600,000/- for damages is on the higher side. I am convinced that KShs. 200,000/- is sufficient as damages in this suit.

(e) Who shall bear the costs of this suit?

89. Finally, the Plaintiff also asked for costs and interests of this suit at court rates. Costs are awarded pursuant to Section 27(1) of the Civil Procedure Act, which provides that:-

27. Costs

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and

incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

90. Costs therefore follow the event, which means that the successful party in any litigation is entitled to costs of the suit. It is also trite that the court is given discretion to determine which party will meet the costs and to what extent, and further, that the court may for good reason decline to award costs to a successful party.
91. The Plaintiff has demonstrated to this court that he has a beneficial interest over the suit land and that the Defendants trespassed into it. There being no justifiable reason to deny the Plaintiff his costs, this Court shall exercise its discretion in his favour. The Plaintiff shall have the costs of the suit to be borne by the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants.

Orders;

92. In conclusion, it is my finding that the Plaintiff has proved his case against the Defendants on a balance of probabilities. I therefore enter judgment for the Plaintiff against the Defendants for:-
- (a) An order of permanent injunction be and is hereby issued restraining the defendants jointly and severally, by themselves, their agents or servants from entering, trespassing, leasing, or in any way dealing with the Plaintiff's parcel

of land known as SOY/SOY BLOCK 10(NAVILLUS)/1423, or on the resultant titles.

- (b) In the event that the Defendant proceeded with the subdivision, then an order of injunction be and is hereby issued restraining the issue of new title Numbers over SOY/SOY BLOCK 10(NAVILLUS)/1423 or and consolidation thereof into SOY/SOY BLOCK 10(NAVILLUS)/1423, and the cancellation of any new title issued, if any.
- (c) A declaration be and is hereby issued that the interference by the Defendants with the plaintiff's ownership of title to SOY/SOY BLOCK 10(NAVILLUS)/1423 is illegal and amounts to trespass.
- (d) Damages for trespass in the amount of KShs. 200,000/ is hereby awarded to the Plaintiff.
- (e) Costs of the suit and interest at the Court rates to be borne by the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants.

93. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **30TH** day of **OCTOBER, 2025** vide Microsoft Teams.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Dr. Chebii for the Plaintiff

Mr. Nam Festus for 1st, 2nd 3rd, and 5th Defendants.

Mrs. Khayo for 4th Defendant

Mrs Jerubet holding brief for Ms Odeyo for 6th and 7th Defendants

Court Assistant - Laban.