



**Otsyula v Ondwasi (Environment & Land Case 26 of 2016)
[2023] KEELC 324 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 26 OF 2016
BN OLAO, J
JANUARY 26, 2023**

BETWEEN

BARASA OTSYULA KHWA OTSYULA PLAINTIFF

AND

JOHN MUNYOBİ ONDWASI DEFENDANT

JUDGMENT

1. The land parcel NO BUKHAYO/MALANGA/4152 (the suit land) is registered in the name of BARASA OTSYULA KHWA OTSYULA (the plaintiff). He holds the title deed thereto issued on 2nd May 2018. The suit land is a resultant sub-division of the land parcel NO BUKHAYO/MALANGA/1415 which was also registered in the name of the plaintiff on 12th April 2007 following the sub-division of the original land parcel NO BUKHAYO/MALANGA/298 which was registered in the name of the late KEFA ONDWASI and whose Estate was Administered by GEORGE ALFRED CHITUYI.
2. By a re-amended plaint dated 6th April 2022 and filed herein on 21st April 2022, the plaint sought judgment against JOHN MUNYOBİ ONDWASI (the defendant) in the following terms:
 1. An order of permanent injunction restraining the defendant whether by himself, his employees, agents, workers and/or servants from trespassing onto and/or otherwise interfering with the plaintiff's possession and use of the land parcel NO BUKHAYO/MALANGA/4152.
 2. Mesne profits.
 3. Costs of the suit.
 4. Any other or further relief that this Honourable Court may deem fit and just to grant.



3. The genesis of the plaintiff's claim is that the defendant has without any colour of right, authority and/or permission trespassed onto the suit land and started using it for his personal gain. Particular of the trespass have been pleaded. In paragraph 4(a) to (1) as follows:
- a. Unlawfully entering onto the suit land without permission.
 - b. Remaining on the suit land without any lawful reason.
 - c. Occupying the suit land without permission.
 - d. Cutting down the plaintiff's trees without authority.
 - e. Grazing his animals on the suit land without permission from the plaintiff.
 - f. Refusing to give vacant possession to the plaintiff despite requests and demands from the plaintiff.
 - g. Ignoring the plaintiff's demands for vacant possession of the suit land.
 - h. Making it impossible for the plaintiff to access the suit land.
 - i. Renting out the suit property to 3rd parties without the plaintiff's permission.

As a result of the foregoing acts, the plaintiff has not been able to properly utilize the suit land and the same is in danger of being wasted.

4. The plaintiff filed the following documents:
1. Copy of title deed for the land parcel NO BUKHAYO/MALANGA/1415 dated 12th April 2007.
 2. Certificate of Search dated 25th April 2014.
 3. Proceedings in BUSIA CHIEF MAGISTRATE'S COURT LAND DISPUTE CASE NO 73 of 2007.
 4. Court order issued on 5th March 2014 in BUSIA CHIEF MAGISTRATE'S COURT LAND DISPUTE CASE NO 73 of 2007.

By another list of documents dated 23rd October 2017, the plaintiff filed the following documents:

1. Order issued on 5th November 2007 in BUNGOMA HIGH COURT CIVIL SUIT NO 45 of 2007.
2. Ruling delivered on 14th October 2007 in BUNGOMA HIGH COURT CIVIL CASE NO 45 of 2007.
3. Certificate of confirmation of Grant issued in NAIROBI HIGH COURT SUCCESSION CAUSE NO 123 of 1991.
4. Mutation Form.
5. Ruling delivered on 4th August 2017 in BUNGOMA HIGH COURT CIVIL CASE NO 45 of 2007.
6. Ruling delivered on 4th August 2006 in BUSIA HIGH COURT MISC CIVIL APPLICATION NO 11 of 1997.



By a further list of documents dated 7th June 2022, the plaintiff filed the following documents:

1. Letter dated 27th September 2021 from NDALILA & COMPANY ADVOCATES.
2. Copy of the title deed for land parcel NO BUKHAYO/MALANGA/4152.

The plaintiff also filed his statement dated 6th May 2014 and that of his witness GEORGE ALFRED CHITUYI dated 10th February 2015.

5. In his statement, the plaintiff states that he is the registered proprietor of the land parcel NO BUKHAYO/MALANGA/1415 (from which the suit land was hived) and that he obtained the title deed thereto and has been in occupation and possession thereof even before the title was created. That he has done extensive farming activities thereon until sometime in June 2007 when the defendant, without any colour of right, trespassed onto the said land and, taking advantage of the plaintiff's absence, started farming and cutting down trees.
6. In his statement dated 10th February 2015, GEORGE ALFRED CHITUYI (PW2) confirms that the plaintiff is his nephew. That prior to his demise, the plaintiff's father one DR YONA OTSYULA had been given land by the witness's father one KEFA ONDWASI who was the proprietor of the land parcel NO BUKHAYO/MALANGA/298 measuring 96 acres. That the witness was the Administrator of the Estate of KEFA ONDWASI who died in 1977. That in 1996, the witness sub-divided that land to the beneficiaries including the defendant who is his brother. However, the defendant went to Court objecting to the Grant of Letters of Administration issued to the witness but that objection was dismissed in BUSIA HIGH COURT MISC APPLICATION NO 11 of 1997 and he (defendant) did not appeal that ruling. In 2007 the plaintiff was given the title to his land pursuant to orders of the Court. That the defendant wants to acquire additional land upto 40 acres out of his entitlement of 17 acres and if he is allowed to do so, he will disinherit other members of the family.
7. In reply to the re-amended plaint, the defendant filed a defence dated 2nd December 2021 in which he stated that the land parcel NO BUKHAYO/MALANGA/1415 does not exist. He added that the BUSIA MAGISTRATES COURT in LAND CASE NO 62 of 2007 had decided that GEORGE ALFRED CHITUYI had not complied with the rulings of the HIGH COURT and therefore all the surveys done on the land parcel NO BUKHAYO/MALANGA/298 including the boundaries of the land parcel NO BUKHAYO/MALANGA/1415 were null and void and the boundaries were to be rectified. The Land Registrar and Surveyor were therefore ordered to rectify the boundaries as per the ruling of the HIGH COURT in MISC APPLICATION NO 11 of 1997. It follows therefore that the suit land is non-existent.
8. The defendant further denied all the particulars of trespass outlined in paragraph 4 of the re-amended plaint adding that the parcel of land belonging to the plaintiff had sugarcane planted on it all this time when the suit was filed. He added that in any case, the suit land does not exist.
9. The defendant denied that the plaintiff is entitled to mesne profits as he has no entitlement to the land which he is claiming. He therefore urged this Court to dismiss the suit with costs.
10. The defendant filed two statements one dated on 2nd December 2021 and the other 21st June 2018 and two (2) lists of documents one dated 21st December 2017 and the other dated 2nd December 2021. He also filed the statement of his witness LEONARD OTUH OTSIENO (DW2) dated 18th March 2018.



11. In his statement, the defendant basically repeats the averments in his defence. That the original land parcel NO BUKHAYO/MALANGA/298 belonged to his late father KEFA ONDWASI who prior to his demise, had sub-divided it among his twelve (12) sons, a primary school and a church. That there was a boundary between his land and that of the plaintiff's late father YONA OTSYULA. The plaintiff was not present when YONA OTSYULA was sub-dividing his land among the beneficiaries and therefore he (the plaintiff) does not know the boundary between his late father's land and the defendant's land. Further, that the plaintiff and his mother have never lived on the suit land. That there was no quarrel between the plaintiff's father and the defendant and that prior to his demise, the plaintiff's father had planted sugar on his land to generate income for his young children who were still in school.
12. The defendant added that land parcel NO BUKHAYO/MALANGA/1415 does not exist and that in BUSIA HIGH COURT MISC APPLICATION NO 11 of 1977, the Court had directed the Land Registrar and Surveyor to mark the boundary of the land parcel NO BUKHAYO/MALANGA/298 which was done. However, GEORGE ALFRED CHITUYI disobeyed the Court order and issued fake title deeds to the plaintiff. All those fake title deeds were declared null and void in BUSIA CHIEF MAGISTRATE'S COURT LAND CASE NO 62 of 2007 and since then, the boundaries have not been rectified.
13. He added that he has never trespassed onto the plaintiff's land and has always kept to his side. Further, that he has never cut down the plaintiff's trees as alleged nor even grazed his cattle on the plaintiff's land. He urged this Court to dismiss the plaintiff's suit with costs as it has no merit.
14. In his second statement dated 21st June 2018, the defendant confirms that the plaintiff is a son to his late brother YONNA OTSYULA who passed away in 1991. That his father was the late KEFA ONDWASI OTSYULA who had six (6) wives, twelve (12) sons and eleven (11) daughters.
15. That the late KEFA ONDWASI OTSYULA owned the land parcel NO BUKHAYO/MALANGA/298 measuring about 100 acres and had allocated each of his sons specific portions with fixed boundaries. That the title which the plaintiff is holding is a product of a process which the Court declared to be null and void. That the plaintiff's father had four (4) wives and the plaintiff's mother never lived on the portion of land allocated to the plaintiff's father. Instead, the plaintiff's father purchased land in KITALE where he moved his family and all through, the plaintiff has lived in KITALE and not on the land in dispute. That all through, the defendant has kept within the confines of the land allocated to him by his father and he has never ploughed or carried out any activities including cutting down trees on the land belonging to the plaintiff's father. That instead, it is the plaintiff who has been engaged in several court cases and destroyed the boundaries fixed by the defendant's late father. That this suit is therefore a result of malice and bad faith and should be dismissed.
16. In his statement dated 18th March 2018, the defendant's witness LEONARD OTUH OTSIENO (DW2) states that he is a neighbour to the defendant. He said he never saw the defendant ploughing the land left behind by the plaintiff's father YONA OTSYULA nor trespass on that land or cut down any trees.
17. The defendant filed the following documents vide the two lists of documents dated 2nd December 2021 and 21st December 2007.
 1. Decree in BUSIA PRINCIPAL MAGISTRATE'S COURT LAND CASE NO 62 of 2007.
 2. Order issued on 21st December 2007 in BUSIA PRINCIPAL MAGISTRATE'S COURT LAND CASE NO 73 of 2007.



3. Order in BUSIA HIGH COURT MISC. APPLICATION NO. 11 of 1997- dated 4th August 2004.
 4. Order in BUSIA HIGH COURT MISC APPLICATION NO 11 of 1997 dated 16th May 2003.
 5. Ruling in BUSIA ELC CASE NO 15 of 2015 delivered on 25th July 2019.
 6. Grant of probate of will issued in NAIROBI HIGH COURT SUCCESSION CAUSE NO 1254 of 1990 in the Estate of DR. YONA OTSYULA and dated 27th March 1991.
 7. Last will of DR YONA OTSYULA dated 13th January 1990.
 8. Title deed for the land parcel NO BUKHAYO/MALANGA/1415 in the name of the plaintiff.
 9. Decree issued in BUSIA PRINCIPAL MAGISTRATE'S COURT LAND CASE NO 62 of 2007 on 28th September 2007.
 10. Order issued on 21st December 2007 in BUSIA PRINCIPAL MARGISTRATE'S COURT LAND CASE NO 73 of 2007.
18. The plenary hearing commenced before OMOLLO J on 21st July 2022 when the plaintiff and his witness testified. The plaintiff told the Court that he inherited the land parcel NO BUKHAYO/MALANGA/1415 from his late father which he then sub-divided to create four (4) parcels including the suit land. That a survey was carried out and the defendant was also given his land parcel NO BUKHAYO/MALANGA/1417 and boundary features were placed but later up-rooted. However, in 2007 when he tried to clear his land to plant sugarcane, the defendant threatened his workers. He added that the defendant has trespassed onto the suit land and cut down his trees. His witness GEORGE ALFRED CHITUYI (PW2) adopted as his testimony the contents of his statement dated 10th February 2015 contents of which I have already summarized above.
 19. The plaintiff also produced as his documentary evidence the documents annexed to the lists already filed herein.
 20. Following the transfer of OMOLLO J in October 2022, I took over the hearing of this case and it was agreed by both MR OKEYO counsel for the plaintiff and MR OKUTTA counsel for the defendant that the case proceeds from where OMOLLO J had left.
 21. The defendant and his witness LEONARD OTHUH OTSIENO (DW2) testified. They both adopted as their testimony their respective statements which I have already summarized above. The defendant also produced as his documentary evidence the list of documents filed herein.
 22. Submissions were thereafter filed by both counsel.
 23. I have considered the evidence by the parties and the submissions by counsel.
 24. I must start by noting that whereas the plaintiff filed a re-amended plaint dated 6th April 2022, the defendant was contented in relying on his defence to amended plaint dated 2nd December 2021 and filed on the same day. The re-amended plaint refers to the suit land as BUKHAYO/MALANGA/4152 measuring 8.35 Hectares whereas the defence to amended plaint suggests that the land in dispute is BUKHAYO/MALANGA/1415. The amended plaint had earlier been filed on 30th November 2021. However, with the consent of the parties on 23rd March 2022, the plaintiff was allowed re-amend his plaint hence the re-amended plaint dated 6th April 2022 and filed on 21st April 2022 after MR OKEYO had informed the Court that the land parcel NO BUKHAYO/MALANGA/1415 and which was



the subject matter in the original plaint dated 5th June 2007 and filed on 6th June 2007 as well as the amended plaint filed on 30th November 2021 and subsequently the re-amended plaint herein had been sub-divided. Therefore, while it is true that the land parcel NO BUKHAYO/MALANGA/1415 no longer exists as pleaded by the defendant in his defence to amended plaint, the suit land as per the re-amended plaint is infact land parcel NO BUKHAYO/MALANGA/4152 which exists at least as at the time the re-amended plaint was being filed on 21st April 2022 following the consent by the parties on 22nd March 2022. That is why at the commencement of this judgment, I have referred to the suit land as the land parcel NO BUKHAYO/MALANGA/4152. Therefore, any reference to the suit land by either the parties, their witnesses and the Court can only be referring to the land parcel NO BUKHAYO/MALANGA/4152 because it is common knowledge that the land parcel NO BUKHAYO/MALANGA/1415 has since been sub-divided to create other parcels of land including the suit land. That is what prompted the filing of the re-amended plaint on 21st April 2022.

25. It is not in dispute that the plaintiff is the registered proprietor of the suit land. He holds the title deed thereto issued on 2nd May 2018. Prior to that, the plaintiff was the registered proprietor of the land parcel NO BUKHAYO/MALANGA/1415 since 12th April 2007. It is that land that was later sub-divided to create the suit land among others.
26. As the registered proprietor of the suit land, the plaintiff is entitled to the protection of right to property guaranteed under Article 40 (1) of *the Constitution* which provides that:
- 40(1) “Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property-
- a. Of any description
 - b. In any part of Kenya.”

The title deed to the suit land confers absolute ownership to the plaintiff. Section 26(1) of the *Land Registration Act* provides that:

26(1) “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The defendant’s challenge to that title is that infact the suit land is non-existence (paragraph 3 of the defence). In paragraph 5 of the defence, the defendant has pleaded thus:

5: “The defendant denies that the plaintiff is entitled to prayers and or claim under paragraph 6 of the amended plaint since the suit parcel in question does not exist neither has the defendant ever trespassed on the plaintiff’s actual land parcel.”

Whereas courts have sometimes had occasions to determining cases where parties hold titles to non-existent land, this does not appear to be one such case. The defendant did concede that



indeed the plaintiff owns land. In paragraph 10 of his statement dated 2nd December 2021, he says:

“I have never trespassed on the land given to the plaintiff’s father at any time. I have kept on my side upto date. Never have I ever occupied the plaintiffs land as claimed.”

When he was cross-examined by MR OKEYO during the plenary hearing, he said:

“The title to parcel NO BUKHAYO/MALANGA/1415 was cancelled by the HIGH COURT IN MISC APPLICATION NO 11 of 1997 which is part of my list of documents dated 21st December 2007. So my evidence is that the land parcel NO BUKHAYO/MALANGA 1415 does not exist. Also, that title was cancelled following the decree in BUSIA PMCC NO 62 of 2007.”

Further on during the same cross-examination, the defendant said:

“I have seen the order in HIGH COURT MISC APPLICATION NO 11 of 1997. It orders the Land Surveyor to fix the boundary. That was not done. The order did not nullify any title.”

27. I have gone through all the orders issued by the various courts including the HIGH COURT filed herein with respect to the original land parcel NO BUKHAYO/MALANGA/298, the subsequent sub-divisions including the land parcel NO BUKHAYO/MALANGA/1415 and the suit land. I have not seen any order cancelling either the title to the land parcel NO BUKHAYO/MALANGA/1415 or the suit land both of which were registered in the name of the plaintiff on 12th April 2007 and 2nd May 2018 respectively. All the orders filed herein only deal with the dispute over boundaries. For instance, the order issued on 16th May 2003 in BUSIA HIGH COURT MISC APPLICATION NO 11 of 1997 has nine (9) orders. And since they are germane to this dispute and have been referred to extensively by the defendant, I shall reproduce them in extenso:

“ORDER

Upon this matter coming up for hearing on the 6/5/2003 before Justice J. K. MITEY, and by consent of both counsels of the parties, it has hereby been ORDERED:-

1. By consent of the parties herein, the District Land Registrar together with the District Land Surveyor Busia to move to land parcel NO BUKHAYO/MALANGA/298 after notifying all the parties.
2. The said officers to fix all the boundaries on the various portions as fixed by the deceased.
3. The said officers to cause sub-division of the suit land and register the new numbers as per the boundary features set by the deceased.
4. The parties to be at liberty to call private surveyors during the exercise.
5. The representatives of the said parties to file their reports in court by 1/7/2003.
6. The aforesaid exercise to be paid for by the 12 sons of the deceased or their representatives on equal basis.
7. That a notice from the Land Registrar to the parties be issued and served upon the parties at least 2 weeks before the exercise on sub-division.



8. Any dissatisfied party at liberty to appeal.
9. Mention on 1/7/2003.

DATED, SIGNED AND SEALED at BUSIA this 16th day of May 2003

DEPUTY REGISTRAR

HIGH COURT

BUSIA.”

It would appear that following the above order, the land parcel NO BUKHAYO/MALANGA/298 was sub-divided and the land parcels NO BUKHAYO/MALANGA/1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424 and 1425 were created.

28. However, four (4) years later on 21st December 2007, the following orders were issued in BUSIA PRINCIPAL MAGISTRATE’S COURT LAND DISPUTE NO 73 of 2007 by HON. M. NJAI (Resident Magistrate):

1. “That BUKHAYO/MALANGA/1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424 and 1425 need to be rectified.
2. That Land Registrar and the Surveyor to rectify the boundaries between the parties following the ruling of the High Court.
3. That surveyors to be accompanied by the Tribunal members

DATED, SIGNED and SEALED

At BUSIA this 21st day December 2007

RESIDENT MAGISTRATE

BUSIA(K).”

It is on the basis of the above orders that the defendant states in paragraph 7 and 8 of his statement dated 2nd December 2021 as follows:

7: “Further, the alleged L.R BUKHAYO/MALANGA/1415 does not exist. The HIGH COURT in land case Miscellaneous Application No. 11 of 1997 (see annex A) ordered the District Land Registrar and Surveyor to mark the land parcel LR. BUKHAYO/MALANGA/298 and fix all the boundaries as were fixed by the deceased. All the boundaries fixed by the deceased had been up-rooted by the then Administrator of the estate GEORGE ALFRED CHITUYI in our absence. GEORGE ALFRED CHITUYI issued fake title deeds to BARASA KHWA OTSYULA without having obeyed the Court Order.” Emphasis mine.

8: “Again in the Principal’s Magistrate’s Court at Busia in land case No. 62 of 2007, all the fake titles that were issued by GEORGE ALFRED CHITUYI were deduced null and void.”

Counsel for the defendant buoyed by the above averments made the following submission in paragraphs 8, 9 and 10:

8: “That there exists a court order not invalidated spelling out how land parcel creating 4152 or others should have been done is not in dispute.”

9: “There is no evidence that creation of 4152 followed what the order of this Court dictated, calling into question it’s creation and therefore ownership.”



10: “The plaintiff cannot plead trespass against any person whereas his title has been questioned and proved to be tainted.”

It is of course true that the HIGH COURT did issue specific orders that the Land Registrar and Surveyor were to fix the boundaries following partitioning of the original land parcel NO BUKHAYO/MALANGA/298. Those directions appear not to have been strictly adhered to because by a subsequent Decree issued by HON. D. ABDULRAHMAN (Resident Magistrate) in BUSIA PRINCIPAL MAGISTRATE’S COURT LAND CASE NO 62 of 2007, the first order reads:

- a. “That GEORGE ALFRED CHITUYI did not follow the HIGH COURT ruling of the beneficiaries getting share of land as was planted on the ground, any activities (surveying) done on BUKHAYO/MALANGA/298 is null and void. This was a violation of the HIGH COURT’S ruling which is an offence.”

Whatever lapses may have occurred on the original land parcel NO BUKHAYO/MALANGA/298 during the survey exercise as ordered by the HIGH COURT that cannot, in itself, be a ground for invalidating the plaintiff’s title. Circumstances under which a title to land can be challenged are specifically set out in Section 26(1) of the new [Land Registration Act 2012](#) which I have already referred to above as well as Section 143 of the repealed Registered [Land Act](#) which was the applicable law when the land parcel NO BUKHAYO/MALANGA/1415 was created in 2007. The defendant did not counter-claim for the nullification of any title. It is also rather late in the day for the defendant to allege that the suit land is non-existent when, other than the land parcel NO BUKHAYO/MALANGA/1415, there were 11 other parcels of land created following this sub-division of the land parcel NO BUKHAYO/MALANGA/298. If the title to suit land is to be treated as “null and void” as suggested by the defendant, then the other titles would suffer the same fate. What the defendant ought to have done was to seek the cancellation of all the resultant parcels of land that were hived off from the original land parcel NO BUKHAYO/MALANGA/298.

29. It is therefore clear from all the above that not only does the suit land exist but the plaintiff holds a valid title too.
30. Having found that the suit land actually exists and is the property of the plaintiff, I shall now consider whether he is entitled to the remedies sought.

ORDER OF PERMANENT INJUNCTION

31. As the registered proprietor, the plaintiff is entitled to the enjoyment of the suit land by keeping away trespassers. It is his case that the defendant has, without any lawful or justifiable reason, entered the suit land, cut down trees and grazed his animals thereon. The defendant has denied those allegations.
32. I have perused the record herein and found that when the plaintiff first moved to this Court in June 2007, he filed an application vide Certificate of Urgency dated 5th June 2007 seeking the main order that the temporary injunction be issued restraining the defendant, his servants and/or agents from ploughing, planting, encroaching, cutting trees, trespassing or in any other way dealing with the land parcel NO BUKHAYO/MALANGA/1415. That land, as is now clear, was subsequently sub-divided to create the suit land. And although the defendant opposed that application through his replying affidavit dated 12th July 2007, it was subsequently allowed by consent of the parties before WANJIRU



KARANJA J (as she then was). Indeed the then counsel for the defendant MR ASHIOYA is recorded as follows when the parties appeared before the Judge on 5th November 2007 for the inter parte hearing:

“We concede to the application dated 5/6/2007 so that we can prepare for the main suit.”

It also appears from the record that the defendant disobeyed the order of injunction and by a ruling delivered on 14th October 2009, MUCHEMI J found him to be in contempt of the orders issued by WANJIRU KARANJA J (as she then was). The Court issued a warrant for his arrest but it is not clear what transpired thereafter. Nonetheless, all that, taken together with the evidence of the plaintiff together with his witness GEORGE ALFRED CHITUYI (PW2) is sufficient evidence to prove that indeed the defendant trespassed onto the suit land as far back as 2007. And a trespass is a continuing tort which is permanent in nature and continues until the defendant is no longer on the land. It is clear that notwithstanding the injunction issued on 5th November 2007 the trespass continued. The prayer for a permanent order of injunction is well merited in the circumstances.

MESNE PROFITS

33. The plaintiff has also sought an order of mesne profits. Such a claim is defined in Section 2 of the *Civil Procedure Act* as follows:

“mesne profits, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

A claim for mesne profits is in the nature of special damages. It must be sufficiently pleaded and proved. In the case of PETER MWANGI MBUTHIA & ANOTHER -V- SAMON EDIN OSMAN 2014 eKLR, the Court of Appeal said:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the Court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned Judge erred in awarding an amount that was neither substantiated nor established.”

In this case, the plaintiff neither specifically pleaded any sum as mesne profits nor placed before the Court any evidence in support of that claim.

34. The same is not available to the plaintiff. It is rejected.
35. With regard to costs, they follow the event unless the Court decides otherwise for good reason. In the circumstances of this case, there is evidence that the defendant even disobeyed the order of temporary injunction restraining him from interfering with the suit land. And while this Court is tempted to make an order that he meets the plaintiff's costs of this suit as a mark of expressing this Court's revulsion at his conduct in disobeying the orders of this court, I will however make no such orders taking into account that the parties are a family.
36. The up-shot of the above is that having considered the evidence by both parties herein, there shall be judgment for the plaintiff in the following terms:
1. An order of permanent injunction is hereby issued restraining the defendant whether by himself, his employees, agents, workers or servants from trespassing onto or in any other way



interfering with the plaintiff's possession and occupation of the land parcel NO BUKHAYO/
MALANGA/4152.

2. The claim for mesne profits is declined.
3. Each party shall meet their own costs.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 26TH DAY OF
JANUARY 2023 BY WAY OF ELECTRONIC MAIL. RIGHT OF APPEAL.**

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

