



**Ondu Substituted by Mathew Obunga Okore v Ondu Substituted by Monica Mugoya & 4 others  
(Environment & Land Case 21 of 2021) [2023] KEELC 16908 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16908 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 21 OF 2021**

**DO OHUNGO, J  
APRIL 25, 2023**

**BETWEEN**

**PETER OKORE ONDU SUBSTITUTED BY MATHEW OBUNGA  
OKORE ..... PLAINTIFF**

**AND**

**PIUS DIN ONDU SUBSTITUTED BY MONICA MUGOYA ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH MBOYA ..... 2<sup>ND</sup> DEFENDANT  
SIMON ONDU ..... 3<sup>RD</sup> DEFENDANT  
LAND REGISTRAR KAKAMEGA ..... 4<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. At the request of parties, this matter was referred to mediation on March 10, 2022. Ultimately, the parties reached a settlement and signed a mediation settlement agreement dated May 5, 2022. On June 27, 2022, in the presence counsels representing parties, judgment was entered in terms of the mediation settlement agreement with an order that each party bears own costs, thereby concluding proceedings in the matter.
2. Subsequently, Richard Din, who asserts that he is a son of Pius Din Ondu who was the initial first defendant, filed Notice of Motion dated November 29, 2022 in which he sought setting aside of the mediation settlement agreement as well as the judgment. The application is supported by an affidavit sworn by Richard Din. Shortly thereafter, the third defendant filed Notice of Motion dated December 29, 2022 in which he sought orders restraining the plaintiff from interring the remains of Helida Anyango Okore on land parcel number Kakamega/Shamberere/1233 (the suit property) pending hearing and determination of the suit. The application is supported by an affidavit sworn by the third



defendant. The third defendant also filed Chamber Summons dated December 29, 2022 in which he sought leave to file an application for review and/or setting aside of the decree arising from the mediation settlement agreement and that leave operates as stay. The Chamber Summons is equally supported by an affidavit sworn by the third defendant.

3. Mathew Obunga, the plaintiff, responded to the applications through his replying affidavits sworn on January 12, 2023 and February 1, 2023. He also filed Notice of Preliminary Objection dated January 12, 2023, in response to Richard Din's Notice of Motion dated November 29, 2022, contending that Richard Din is not a party to the suit.
4. This ruling is in respect of the three applications and the preliminary objection. Parties filed and exchanged written submissions.
5. I have considered the applications, the affidavits, the preliminary objection, and the written submissions. I will deal first with Richard Din's Notice of Motion dated November 29, 2022 and the preliminary objection.
6. The law relating to preliminary objections was stated Law JA in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 thus:

So far as I'm 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.

7. Consequently, a valid preliminary objection must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. As I understand it, the plaintiff's contention is that Richard Din cannot intervene in the matter in the manner sought in Notice of Motion dated November 29, 2022 since he is not a party to the suit.
8. The parties to this suit are self-evident. Richard Din is not a party to the suit. In his affidavit, he maintains that he is a son of Pius Din Ondu who was the initial first defendant. His grouse with the mediation settlement agreement and the ensuing consent judgment is that he was in prison between the year 2012 and June 22, 2022 and that the mediation settlement agreement was reached without his knowledge or consent. Although he may be a member of the family of some of the litigants, the plain truth is that he is a stranger to the case and has no capacity to seek to set aside a judgment in a case where he is not a party. The issues that he is raising belong to a different forum, probably the succession court. His application is clearly an abuse of the court's process. I find merit in Notice of Preliminary Objection dated January 12, 2023 and accordingly strike out Richard Din's Notice of Motion dated November 29, 2022.
9. Regarding the third defendant's Notice of Motion dated December 29, 2022 which seeks orders restraining the plaintiff from interring the remains of Helida Anyango Okore on land parcel number Kakamega/Shamberere/1233 (the suit property) pending hearing and determination of the suit, I note that the suit was in fact determined on June 27, 2022 when judgment was entered. Further, Mathew Obunga, the plaintiff, deposed in his replying affidavit sworn on 1<sup>st</sup> February 2023 that Helida Anyango Okore was buried on December 31, 2022 and that the application is therefore overtaken by events. That position has not been controverted by the third defendant. I find no merit in Notice of Motion dated December 29, 2022 and I therefore dismiss it.



10. I now turn to the third defendant's Chamber Summons dated December 29, 2022 in which he seeks leave to file an application for review and/or setting aside of the decree arising from the mediation settlement agreement and that leave operates as stay. The application is stated to be brought inter alia under Rule 39 (1) and (2) of the *Civil Procedure (Court Annexed Mediation) Rules*, 2022. The said provisions state that no application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of court and that such an application for leave shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely in setting aside the order or decree.
11. Further, Rule 39 (3) of the *Civil Procedure (Court Annexed Mediation) Rules*, 2022 limits the grounds upon which such an application can be made. These include misconduct, fraud, or a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter; fraud, collusion, or misrepresentation by any party to the mediation (other than the party applying) or any witness or person who took part in the proceedings and whose participation materially affected the outcome; a fundamental mistake by any or all of the parties to the mediation as to the existence or state of the subject matter, person or thing or to any set of facts that materially affected the parties' decision to enter into the subject agreement and which has rendered such agreement unfair and inequitable; where a party was, at the time of the making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement; or where the settlement agreement is invalid under Kenyan or international law, or is or has become incapable of enforcement under Kenyan law.
12. The reasons advanced by the third defendant include that he was not consulted and was not aware of the mediation proceedings or even the ensuing consent judgment. He further asserts that he did not sign the mediation settlement agreement.
13. The plaintiff deposed in his replying affidavit that the third defendant was aware of and attended the mediation sessions. He annexed copies of mediation attendance sheets for sessions held on April 7, 2022, April 26, 2022, and May 5, 2022 to back his position. A perusal of the sheets conforms that the third defendant attended the sessions. Further, a perusal of the court's record shows that the matter was referred to mediation on March 10, 2022 in the presence of Ms Ogolla, counsel appearing for the third defendant. On June 27, 2022, when the mediation settlement agreement was adopted and judgment entered by consent, Ms Ogolla was present for the third defendant and gave her seal of approval. She was also in attendance at the mediation sessions held on April 26, 2022 and May 5, 2022. I am not persuaded that the third defendant was not consulted or was not aware of the mediation proceedings. Having consented to the ensuing judgment, which was exclusively in terms of the agreement, he cannot turn around and seek setting aside on claims that he did not sign the agreement. I further note that Chamber Summons dated December 29, 2022 was filed on December 30, 2022, over six months after the judgment was entered by consent. I find the delay to be unreasonable. In view of the foregoing, I find no merit in Chamber Summons dated December 29, 2022.
14. In the result, I make the following orders:
  - a) Richard Din's Notice of Motion dated November 29, 2022 is struck out.
  - b) The third defendant's Notice of Motion dated December 29, 2022 is dismissed.
  - c) Chamber Summons dated December 29, 2022 is dismissed.
  - d) In view of the family relationship between the parties, I make no order as to costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF APRIL 2023.**



**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**No appearance for the plaintiff**

**No appearance for the first and second defendants**

**Mr Okinyo and Mr Omenta for Richard Din and for the third defendant**

**No appearance for the fourth and fifth defendants**

**Court Assistant: E. Juma**

