

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC CASE NO. E021 OF 2021

PETER OKERE ONDU (Substituted by
MATHEW OBUNGA OKORE)
.....**PLAINTIFF**

-VERSUS-

PIUS DIN ONDU (Substituted by
MONICA MUGOYA & 2 OTHERS)
.....**DEFENDANTS**

RULING

Introduction

1. On 5th May 2022 parties herein recorded a mediation agreement to the effect that; that parcel No. Kakamega/Shamberere/1233 be resurveyed to ascertain the exact land in question; that the surveyor did his work and parties agreed that the land is 1 Hectare; that the defendants have agreed not to evict the plaintiff out of the parcel in dispute; that the plaintiff has agreed to

compensate the defendant by buying 1.5 acres of land within the same area; that the defendant to immediately start the succession process of land parcel No. Kakamega/Shamberere/1233 in order to transfer the 2.5 acres to the plaintiff; that the costs of the case be determined by the court and that the agreement is final and no appeal shall be filed against it.

2. It is apparent that the defendants did not comply with the mediation agreement as no succession proceedings were filed as agreed. Consequently, the plaintiff filed application dated 16th June 2025 seeking orders that the court compels the defendants to immediately commence succession process of Land parcel No. Kakamega/Shamberere/1233 in order to transfer the 2.5 acres to the plaintiff and that in the alternative, the Deputy Registrar of this court be authorized to sign all relevant documents to cause the transfer of parcel Kakamega/Shamberere/1233 to the plaintiff. Therefore, this ruling is in regard to the application dated 16th June 2025.

3. The application was premised on the supporting affidavit of the applicant dated 16th June 2025. The applicant's case being that the parties agreed that the defendant will immediately commence succession proceedings of parcel No. Kakamega/Shamberere/1233 to transfer the land to the plaintiff while the plaintiff would purchase 1.5 acres in favour of the defendants. That the plaintiff complied by purchasing the agreed 1.5 acres being parcel No. Butso/Ingotse/4104 measuring 0.6 hectares while the defendant has not commenced the succession process. That the court should issue timelines for compliance.
4. The matter was opposed. The respondents filed preliminary objection, grounds of opposition and replying affidavit sworn by the 1st defendant; all dated 14th November 2025. The respondents stated that this court lacks jurisdiction to hear, determine and enforce the orders sought as they relate to succession matters which are outside the jurisdiction of this court. That the orders sought are a preserve of the High Court under the Law of Succession Act and that this court can only

handle matters provided for in Article 162 (2) (b) of the Constitution and provisions of the Environment and Land Court Act. That the mediation agreement and decree are null and void *ab initio* in so far as they purport to compel the defendants to commence succession proceedings.

5. Further that the orders sought are vague, uncertain and incapable of enforcement as the agreement refers to a defendant in a scenario where there are three defendants and that this court has no machinery to supervise proceedings that ought to be undertaken in the Succession court. Also, that the Deputy Registrar of the ELC cannot execute documents in regard to succession proceedings.

6. In her replying affidavit, the 1st respondent stated that she is a widow aged 95 years and that the land referred to by the plaintiff is her only source of livelihood. That the application herein was dropped at her doorstep by a motorcycle rider on 13/11/2025 at 5;30 pm and that she has faced injustice. That the mediation agreement provided that she gets 1.5 acres within the same

locality of Efuetere, and not land that is 15 Kilometers away, which is contrary to the agreement. That the dispute is in Shamberere Kabras, yet the alleged purchased land is in Butso and that they were not consulted in the purchase of the land. That sending her 15 Kms away from her community amounts to a punishment in view of her advanced age. She gave fresh conditions for compliance with the mediation agreement and stated that she should get half acre from No. parcel Kakamega/Shamberere/1148 which is opposite her gate and 1.5 acres be purchased for her within the same locality, and that in default the plaintiff should vacate her 2.5 acres.

7. The court was referred to the cases of **Owners of Motor Vessel "Lilian S" Caltex Oil (Kenya) [1989] KLR 1, Joseph Murethi Njoroge & 2 Others v Jane Wairimu Mwangi & Another**, and **Virginia Wanjiru Gachomba v Robert Gachomba & 2 Other [2015] e KLR**, among others.

Analysis and determination

8. The court has carefully considered the application, preliminary objection, grounds of opposition and replying affidavit. The issues that arise for the court's determination are whether this court has jurisdiction to grant orders sought and whether the applicant deserves the orders sought.

9. It is not disputed that in this matter a mediation agreement was entered into by the parties herein and it is also not disputed that the defendants have not commenced succession proceedings as agreed by the parties herein. While parties agreed that "the defendant to immediately start the succession process of the land parcel No. Kakamega/Shamberere/1233" in order to transfer it to the plaintiff, it is clear to me that parties entered into a mediation agreement that did not make legal sense. Succession is done in respect of a deceased person and it is intended to identify the deceased person's assets and liabilities and to distribute the assets as by law provided to the heirs of the deceased having taken into account the deceased's liabilities if any. Therefore, succession is not done in respect of

land, but in respect of a deceased person. Incidentally, no deceased person is stated in the mediation agreement. Is the question of compelling a person to file succession a matter within the jurisdiction of this court, which jurisdiction is delineated by provisions of Article 162 (2) (b) of the Constitution as read with section 13 of the Environment and Land Court Act, which is to deal with matters concerning the environment and the use and occupation, and title to, land.

10. On the question of compelling the filing of succession proceedings, that is the jurisdiction of the Probate and Administration court and not this court. If the applicant wants to compel the filing of succession proceedings, he ought to cite the defendants in a succession cause. Citations cannot be done in this court. The argument that there is a consent filed in this court and that this court should enforce it, is not plausible because jurisdiction flows from the Constitution or statute or both and cannot be conferred by consent of the parties. (See **Samuel Kamau**

Macharia & Another v Kenya Commercial Bank & 2 Others, SC No. 2 of 2011 [2012] e KLR). In short, parties by agreement cannot clothe a court with jurisdiction, where none exist in law.

11. Regarding the term in the mediation agreement requiring “the defendant” to file succession proceedings, suffice it for this court to say as follows; Not everyone has a right to file succession and obtain grant in respect to the estate of a particular deceased person. The Law of Succession Act provides for specific persons related to the deceased who have rights to apply for a grant in respect of such deceased person’s estate. Even if there is a consent filed in an ELC Court granting a particular person power to file succession in respect of a particular deceased person, if that person is not recognized under the Law of Succession Act, such a consent will not trump the provisions of the Law of Succession Act. Where a person who has the right to file succession proceedings in respect to the estate of a particular deceased person fails to apply for a grant resulting in the need to compel them to file succession,

then, the person seeking such compulsion, ought to file citation proceedings in the Probate and Administration court, in line with provisions of section 62 of the Law of Succession Act as read with Rule 22 of the Probate and Administration Rules. Rule 2 of the Probate and Administration Rules define “court” as the Judge of the High court or a Resident Magistrate. Therefore, this court has no power to compel anyone to file succession proceedings in regard to the estate of a deceased person, even if the parties consent to clothe this court with such power.

12. It is high time that parties and their advocates take a moment when drafting agreements, consents or mediation agreements to ensure that such agreements or consents are enforceable within the courts where they are filed. They should also ensure that such consents directly address the dispute and have the necessary clarity leaving no room for ambiguity in interpretation.

13. For those reasons, I am not persuaded that I have the necessary jurisdiction to enforce term No. 5 of the

mediation agreement dated 5th May 2022. I therefore strike out the application dated 16th June 2025 for want of jurisdiction, with costs to the respondents.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 19TH DAY OF NOVEMBER 2025**

A. NYUKURI

JUDGE

In the presence of;

Mr. Kiprop holding brief for Ms Ndeda for the plaintiff

Mr. Mwamu for the defendants

Court Assistant: Delphine