



Chege (Suing as the legal representative of the Estate of Grace Wairimu - Deceased) v Chief Magistrate Court-Thika & 3 others (Land Case Petition E001 of 2024) [2024] KEELC 7499 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7499 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
LAND CASE PETITION E001 OF 2024
BM EBOSO, J
NOVEMBER 6, 2024

BETWEEN

PAUL MUKUI CHEGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GRACE WAIRIMU - DECEASED) PETITIONER

AND

THE CHIEF MAGISTRATE COURT-THIKA 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

THE LAND REGISTRAR, THIKA 3RD RESPONDENT

TERESIA NJERI KIRIKA 4TH RESPONDENT

RULING

1. What falls for determination in this ruling is the 4th respondent’s notice of motion dated 25/4/2024 through which she seeks an order dismissing this petition on the ground that the petition is res judicata. The applicant contends that the petition is res judicata because it was preceded by Thika District Land Dispute Tribunal Case Number 45 of 2011, which was determined through an award rendered on 14/7/2011 and was subsequently adopted into a Judgment by the Thika Chief Magistrate Court, and a Decree was subsequently issued on 31/10/2011. The single question that falls for determination in the application is whether this suit is res judicata.
2. While perusing both the e-portal and the physical file in preparation for the writing of this ruling, it has emerged that although this cause was initiated electronically as a petition under the Bill of Rights, no formal petition was presented either electronically or physically. A perusal of the Court’s electronic and physical records reveals that Paul Mukui Chege only filed the following documents: (i) an interlocutory notice of motion dated 9/2/2024; (ii) a certificate of urgency; (iii) an affidavit in



- support of the interlocutory motion; (iv) a verifying affidavit sworn on 9/2/2024; and (v) a list and bundle of documents dated 9/2/2024.
3. Before I make pronouncements on the legal ramifications of the above omission, I will briefly outline the parties' respective cases in the application dated 25/4/2024. This will provide a clear context for the purpose of appreciating the legal impact of the failure to present a petition under the relevant Rules.
 4. The application was supported by an affidavit sworn on 25/4/2024 by Teresia Njeri Kirika. Annexed to the affidavit were the following four exhibits: (i) copy of the decree issued on 31/10/2011; (ii) copy of the notice of motion dated 9/8/2023 filed under certificate of urgency; (iii) copies of the ruling and order dated 30/10/2023; (iv) copy of the title deed issued on 31/10/2023. The application was canvassed through written submissions dated 6/6/2024, filed by M/s Njoroge Kugwa & Company Advocates.
 5. The case of the applicant is that in 2011, she instituted proceedings against Grace Wairimu Chege at the District Land Disputes Tribunal in Thika in relation to the suit property and an award was issued in her favour. The said award was adopted as a Judgment of the Court by the Thika Chief Magistrate Court on 31/10/2011. The applicant adds that on 9/8/2023, she instituted execution proceedings against the legal representatives of the estate of the late Grace Wairimu Chege. The applicant further contends that she subsequently became the registered owner of the suit property. The applicant adds that no appeal was preferred against the order of 31/10/2011 or the ruling given on 31/10/2023 allowing execution proceedings. The applicant urges this Court to strike out the suit because it offends the mandatory provisions of Section 7 of the *Civil Procedure Act*.
 6. The petitioner opposes the application through a replying affidavit sworn on 20/5/2024 by Mukui Chege and written submissions dated 3/10/2024, filed through M/s S Bakari & Company Advocates. The case of the petitioner is that the Tribunal only heard and determined the issue of ownership of the suit property and not the jurisdictional issues raised in the petition. The petitioner contends that the petition seeks orders in the form of judicial review reliefs to quash the Tribunal's decision which was made without jurisdiction. The petitioner further contends that the petition neither challenges the merits of the decision nor does it intend to appeal the Tribunal's decision. The petitioner adds that the petition invokes the supervisory jurisdiction of this Court under Articles 165 (6) and (7) to interrogate whether the Tribunal had jurisdiction to deliver the award.
 7. The petitioner contends that through the petition, he is seeking enforcement of his rights conferred by Articles 40, 47 and 50 of *the Constitution* of Kenya, 2010. The petitioner further contends that the doctrine of res judicata is only applicable where the issue at hand has been determined by a court of competent jurisdiction. The petitioner adds that the issue in dispute in this petition is the jurisdiction of the Tribunal, an issue which has neither been raised nor determined before. It is the petitioner's position that the doctrine of res judicata cannot be invoked when a superior court is exercising appellate or supervisory jurisdiction on account of proceedings before a subordinate court or tribunal. In conclusion, the petitioner urges the court to find that the applicant's application dated 25/4/2024 lacks merit and dismiss it with costs.
 8. Taking into account the above context and the law, what are the legal ramifications of the petitioner's failure to present a petition? Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides the following applicable framework:
 - " 4. Where any right or fundamental freedom provided for in *the Constitution* is
(1) allegedly denied, violated or infringed or threatened, a person so affected or



likely to be affected, may make an application to the High Court in accordance to these rules.”

9. Rule 10(1) and (2) provide as follows:

- “ 10. An application under rule 4 shall be made by way of a petition as set out in
- (1) Form A in the Schedule with such alterations as may be necessary.
 - (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.”

10. Suffice it to state that, in circumstances where, for proper reason, a claimant is unable to present a formal petition, the claimant is expected to move the Court Registry and cause his informal (oral) petition to be reduced into a formal petition by the Court Registry whereafter it is placed before the Judge for disposal directions.

11. It is clear from the record that is before this court that Paul Mukui Chege intended to move the Court by way of a formal petition in tandem with Rule 10(1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. He, however, did not present the formal petition. Put differently, although this cause was registered as a petition, there is no formal petition presented to the court. The formal petition which was intended to initiate the cause was neither uploaded nor physically presented to the Court Registry.

12. In the absence of a petition, this cause is fatally defective and stands to be struck out on that ground. It stands to be struck out because the court does not have the platform on which to exercise jurisdiction under the Bill of Rights. Suffice it to add that, the doors to the seat of justice will remain wide open to Mr. Paul Mukui Chege.

13. Lastly, in the absence of a formal petition, the court does not have a basis for making merit pronouncements on the issue of res judicata.

14. For the above reasons, this cause which was registered as a petition is hereby struck out on the ground that no petition was presented to the court. In accordance with the principle that costs follow the event, the party who initiated the proceedings shall bear costs of the cause. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF
NOVEMBER 2024**

B M EBOSO

JUDGE

In the Presence of: -

Ms Kendi for the Petitioner

Ms Kebala for the 4th Respondent

Court Assistant: Hinga

