



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 142 OF 2014 (FORMERLY KKG 548 OF 2013)

RICHARD ETYANGAPLAINTIFF

= VERSUS =

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT

AND

RURAL ELECTRIFICATION AUTHORITY.....THIRD PARTY

RULING

1. This ruling is on a Preliminary Objection predicated on a notice to raise it dated 29/11/2017 and filed on 30/11/2017. The objection is simply that the plaintiff's suit is misconceived, frivolous and devoid of merit for the reason, *inter alia*, that the Plaintiff has not complied with the Statutory Provisions of the Law, specifically Sections 6(1), 61(3), 107, 108, and 110(1) of the Energy Act, 2006 together with Rule 2 and 4 of the Energy (Complaints Disputes Resolution) Regulations, 2012.

2. The Plaintiff – **RICHARD ETYANGA** – filed his suit here against the Defendant – **KENYA POWER AND LIGHTING COMPANY LIMITED** – on 19/12/2013 vide a plaint dated 18/12/2013. He complained that the Defendant has trespassed into his land – NORTH-TESO/ANGURAI/748 – through its agents and/or employees with the intention of installing a power transmission line. In the process of preparing to install the line, the Defendant's agents and/or employees are said to have cut down trees without permission. The Plaintiff is seeking various reliefs including damages.

3. The objection is raised because the Plaintiff came to court direct without first exhausting other avenues made available by the law.

4. The objection was canvassed by way of written submissions. But the Plaintiff didn't file submissions. The Defendant's submissions were filed on 29/11/2018. There are also submissions of the Third Party – **RURAL ELECTRIFICATION AUTHORITY** – enjoined in the suit later. The two sets of submissions are clear. The first port of call by the Plaintiff should have been the Energy Regulation Commission, a body established by Section 4 of the Energy Act and whose mandate is to be found at Section 6 of the same Act. The Plaintiff's complaint should have been filed there in the first instance. If not handled to his satisfaction at that level, his recourse should be to appeal before a tribunal set up under the same Act.

5. The Defendant's submissions in particular cited pronouncements in decided cases emphasising that where the law provides for or has established a dispute resolution forum, it is not open to a party to directly file his matter in court without first ventilating his claim before the established forum. One such pronouncement is to be found in the Supreme Court's decision in **ALICE MWERU NGAI Vs KENYA POWER AND LIGHTING CO. LTD [2015] eKLR** where the court cited the following quotation from the Supreme Court's Constitution application No. 2 of 2011.

“To allow the application now before us would constitute an interference with due process and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would constitute an impediment to the prospects of any appeal from the High Court up to the Supreme Court. This is a situation in which the court must protect the jurisdiction entrusted to the High Court”.

6. The Third Party on its part cited the pronouncement of the Court of Appeal in **PETER NJUGUNA MUTURI Vs KENYA WILDLIFE SERVICE: CA No. 260/2013** where the cases of **DIANA KEITH KILONZO Vs IEBC & 2 others, NATIONAL ASSEMBLY Vs KARUME [2008] IKlr 426 (ep)**, and **KIMANI WANYOIKE Vs ELECTORAL COMMISSION CA No. 213 of 1993 (UR)** were cited

with approval for the position that a party should first go to the forum established by law for dispute resolution before going courts of law.

7. This has been the law for a long time even in other jurisdictions. In **ANISMINIC LTD Vs FOREIGN COMPENSATION COMMISSION & Another: [1969] I ALL ER 208**, the remarks of Lord Pearce (as he then was) were as follows:

“My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time parliament sets up special tribunals to deal with special matters and give them jurisdiction to decide these matters without any appeal to the courts. When this happens the court cannot hear appeals from such tribunals or substitute their own views on any matters which have been specifically committed by parliament to the tribunal”.

8. In this matter itself, I have already pointed out that the Plaintiff has not filed any submissions. And the submissions already filed by the opposite side captures the law with clarity. It was wrong for the Plaintiff to come to court without first having recourse to the forum of first instance established by the Energy Act. This court would be failing in its duty if it allows the Plaintiff to continue with his case here. Infact this court has no mandate to handle the matter as a forum of first instance.

9. The Preliminary Objection raised is therefore hereby upheld. The Plaintiff’s case is struck out with costs to both the Defendant and the Third Party.

Dated and signed at Busia this 12th day of September, 2019.

A. K. KANIARU

JUDGE

Delivered at Busia this 24th day of September, 2019 by

A. OMOLLO

JUDGE