



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 337 OF 2017

ALI SIMBUCHI MAKOKHA (*suing as a legal Attorney of*)

JOSEPH WEKESA NABISWA PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD)

RURAL ELECTRIFICATION AUTHORITY) DEFENDANTS

RULING

Counsel for the 1st defendant raised a preliminary point of law, to be determined in limine, that the plaintiff's suit is hopelessly, misconceived, frivolous, totally devoid of merit and malafides for the reason inter alia that:-

1. The plaintiff has not complied with the mandatory provisions of the law namely section 6 (1), 61 (3), 107, 108 and 110 (10) of the Energy Act 2006 as read together with Rule 2 and 4 of the Energy (complaints and disputes Resolutions) Regulations 2012.

the 1st defendant prior to the hearing of this suit or raised a preliminary objection that this suit is incompetent against it and thus its name ought to be expunged from these proceedings having been wrongfully sued herein as the electricity lines in question were constructed by the 2nd defendant and not the 1st defendant.

The plaintiff submitted that the word used in the regulations is "may" and they are at liberty to choose to come to this court directly. Secondly as to who constructed the power lines is a matter of fact and not law.

The Energy (Complaints and Dispute Resolution) Regulations, 2012, published as Legal Notice No. 42, Kenya Gazette Supplement No.49 (Legislative Supplement No. 15) on May 25, 2012 provides the means by which the Commission can help resolve complaints and disputes between a licensee and its customers where any party remains dissatisfied after exhausting the licensee's complaints resolution procedures. Section 7(2) states that;

"A party to a dispute may refer the dispute to the Commission on form S-2 as set out in the second schedule".

On the interpretation of statutes where the words "**may**" and "**shall**" have been used, the Court of Appeal in the case of Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR, the court of appeal held that;

*"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision..... Whether the words "**shall**" or "**may**" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."*

See the case of **Sony Holdings Ltd –vs- Registrar of Trade Marks & Another [2015] eKLR**.

In the Australian case of **Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council (1948) 77 CLR 544 at 568, Williams, J** stated:

"'May', unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears."

In the case of Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR, the court of appeal held that;

“From the foregoing, it is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. Having arrived at that conclusion, we are satisfied that the learned Judge of the High Court did not err by upholding the lower court's finding. Section 62 (1) of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal. Such person, is required to make an application to the District Committee. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. The appellant ought to have approached the District Committee first and followed the appellate system designed under the Act. The avenue of Judicial Review which the Committee is always subject to, was also available. Filing the claim before the District committee as the appellant appears to have done and filing a suit for negligence based on the same facts is certainly in abuse of court process. The trial court and the High Court were right in rejecting the suit. However, the two courts made orders dismissing the suit which is ordinarily the consequential order for matters heard and determined on merits. The correct order, in our view, ought to have been the striking out of the suit. The order for dismissal shall thus be set aside and substituted accordingly”.

So also I find that in this case there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. For these reasons I find that the preliminary objection has merit and I strike out this suit with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 30TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE