



**Republic & another v Cabinet Secretary for Treasury & 2 others (Judicial Review 001 of 2021) [2022] KEHC 13127 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13127 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
JUDICIAL REVIEW 001 OF 2021**

**JN KAMAU, J**

**SEPTEMBER 28, 2022**

**IN THE MATTER OF ARTICLES 2, 3, 10,19,20,23,25,  
27,47,165(6),258 AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 2(1), 3(1),10(1)(2), 19(2), 20(2), 27(1),  
35(1), 47(1) (2), 48, 50(1)(2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4 AND 5 FAIR  
ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

**AND**

**IN THE MATTER OF THE PERSONS WITH DISABILITIES  
(INCOME TAX DEDUCTIONS AND EXEMPTIONS) ORDER, 2010**

**BETWEEN**

**REPUBLIC ..... 1<sup>ST</sup> APPLICANT**

**LEILA OJIAMBO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**CABINET SECRETARY FOR TREASURY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITY 2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. In her notice of motion dated April 7, 2021 and filed on April 12, 2021, the ex-parte applicant sought for orders of mandamus compelling the respondents to renew her tax exemption certificate and to refund the deductions already made by the 3<sup>rd</sup> respondent.
2. She swore an affidavit in support of her application on April 7, 2021. She averred that she was duly registered with the 3<sup>rd</sup> respondent and had a pin number as was required by law. She added that she was also registered with the 2<sup>nd</sup> respondent and that her registration number was NCPWD/P/152543.
3. She asserted that before she was declared hundred (100%) per cent disabled and registered by the 2<sup>nd</sup> respondent as a person with disability, she was assessed at a level 4/5 hospital as was required by the regulations and that her disability medical assessment report forwarded to the ministry of health oversight committee which consisted of five (5) doctors and four (4) physiotherapists for evaluation before it forwarded recommendations to the 2<sup>nd</sup> respondent.
4. She was emphatic that once an individual was registered as a person with disability, he or she could apply for benefits such as tax exemption, claim tax relief from treatment received in hospitals and could also import vehicles duty free. She asserted that such tax relief applications were reviewed by the 2<sup>nd</sup> respondent before they are forwarded to the 3<sup>rd</sup> respondent.
5. She pointed out that in 2013, she applied to the 3<sup>rd</sup> respondent for which tax exemption which was granted on 1<sup>st</sup> October 2013 and referenced 20131024/3485 and issued with a tax compliance certificate. She added that the said tax exemption was to run for a period of five (5) years ending in 2018, after which, she applied for a renewal to the 3<sup>rd</sup> respondent. However, it failed to respond to her application.
6. She contended that the 3<sup>rd</sup> respondent embarked on collecting taxes from her which monies would have provided a relief to her being a single mother of two (2) boys who were dependent on her. She asserted that she had submitted all the requirements and/or documents to the 3<sup>rd</sup> Respondent for consideration.
7. It was her contention that Kenya was a signatory to the *United Nations Convention on the rights of persons with disabilities* and it was within the vision 2030 for the government to provide universal health coverage to everyone including persons with disabilities.
8. She further contended that the respondents' failure to respond to her application violated her rights to fair administrative action under article 47 of the *Constitution* which entitled her to efficient, lawful, reasonable and procedurally fair action. She added that the respondents had also violated her right to fair hearing under article 50 of the *Constitution* which entitled her to appropriate, independent and impartial hearing.
9. It was her further assertion that the 3<sup>rd</sup> respondent was a quasi-judicial body which was required by law to act fairly, timeously and without discrimination, which test it had failed in the eyes of the law. She thus urged the court to grant her the orders that she had sought in the application here.



10. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file any response to the proceedings herein. Although the 3<sup>rd</sup> respondent indicated to the court that it had filed a replying affidavit in response to the said application, the same was not in the court file. It was also not in the electronic filing system.
11. The ex-parte applicant's written submissions were dated September 15, 2021 and filed on September 16, 2021. the 1<sup>st</sup> respondent's written submissions were dated December 6, 2021 and filed on December 7, 2021 while those of the 3<sup>rd</sup> respondent were dated October 27, 2021 and filed on November 2, 2021. The 2<sup>nd</sup> respondent did not file any written submissions.
12. This judgment is therefore based on the said written submissions which parties relied upon in their entirety.

### Legal Analysis

13. The ex-parte applicant placed reliance on the cases of *Shah v Attorney General (No 3) Kampala* HCCM No 31 of 1969 EA 543 and *Republic v Kenya National Examinations Council ex parte Gathenji & others* [1997] eKLR where the common thread was that mandamus was a prerogative order that was issued to compel the performance of a duty by any person, corporation or tribunal.
14. She invoked section 42 of the *Persons Living With Disability Act* and argued that she had followed all the required procedures and conditions to be met in applying for tax exemption. She further cited section 35 of the *Persons Living With Disability Act* and relied on the case of *Republic v Town Clerk, Kisumu Municipality, ex parte East African Engineering Consultants* [2007] 2 EA 441 where it was held that an order of mandamus compelled a public officer to act in accordance with the law and that the court would only issue a mandatory order if it concluded that it was the only decision lawfully open to the public body and there was no other legal remedy that was available to remedy the infringement of a legal right. The 1<sup>st</sup> respondent also relied on this case and rehashed the same holding.
15. She further referred to regulation 8(1) of the *Persons With Disabilities (Registration) Regulations*, 2009 and submitted that she had been constantly reminding the 3<sup>rd</sup> respondent about its failure to respond to her application but her efforts had not been successful.
16. She referred to section 4(3) of the *Fair Administrative Action Act* and reiterated that the Respondents' failure to respond to her application for renewal of tax exemption and/or to issue her with tax exemption certificate was unjust, unfair and had violated her right to fair administrative action under article 47 and article 50 of the Constitution.
17. She placed reliance on the case of *Republic v National Council of Persons with Disabilities & another Ex parte Justus Musyoki Kimolo* [2021] eKLR where the court granted the ex parte applicant an order of mandamus compelling the 2<sup>nd</sup> respondent therein to issue the applicant with a tax exemption certificate.
18. She also relied on the case of *Diana Kethi Kilonzo v IEBC & 2 others* (eKLR citation not given) where the court held that if constitutional bodies were operating within the law, then the court would not interfere.
19. On its part, the 1<sup>st</sup> respondent referred this court to the case of *Republic v Town Clerk, Kisumu Municipality, Ex parte African Engineering Consultants* (Supra) where it was held that an order of mandamus compelled a public officer to act in accordance with the law.
20. Together with the 3<sup>rd</sup> respondent it placed reliance on the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Pelt Security Services Limited* [2018] eKLR where



the court held that the purpose of judicial review was to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of statutory duties and functions or acting outside of their jurisdiction and could not be used to curtail statutory bodies or public officers from the lawful exercise of power within their statutory mandate.

21. The 1<sup>st</sup> respondent contended that if there was a condition precedent necessary for the duty to accrue, an order of mandamus would not be granted until that condition precedent had come to pass as was held in the case of *Republic v Cabinet Secretary for Treasury & another Ex-parte Theresa Ongore Auma; Kenya Revenue Authority (Interested Party)* [2020] eKLR that was also relied upon by the 3<sup>rd</sup> respondent herein.
22. The 1<sup>st</sup> respondent further relied on section 7(c) of the *Persons Living With Disability Act* and argued that it was the function of the 2<sup>nd</sup> respondent to register persons with disability. It was emphatic that under section 42 of the said *Persons Living With Disability Act*, no person was eligible for an exemption or deduction of taxes unless the exemption or deduction had been recommended by the 2<sup>nd</sup> respondent and approved by the appropriate government authority.
23. It also referred to section 35 of the *Persons Living With Disability Act* and pointed out that according to Legal Notice No 36 of 2010 (The Persons with Disability (Income Deductions Exemption) Regulations), it was the 2<sup>nd</sup> Respondent who received and reviewed the application for exemption and established a vetting committee which communicated the verdict of whether an exemption should be issued or not.
24. It added that together with the 2<sup>nd</sup> respondent, they were also guided by article 201 of the *Constitution* while granting the exemption so that the burden of taxation was shared fairly and if in their opinion an ex-parte applicant no longer suffered disability that warranted her to be entitled to an exemption, then the same would be done in good faith and in public interest, an argument that was also advanced by the 3<sup>rd</sup> respondent herein.
25. It submitted that being a registered person with disability was not an automatic qualification for exemption and that not every disability qualified for exemption. It added that the fact that a taxpayer got an exemption previous year on the basis of disability did not necessarily qualify him for an exemption the following year or indeed forever and that was why there was a process for renewal which must be followed.
26. It was emphatic that tax exemption was therefore a privilege that was not absolute for the reason that it and 2<sup>nd</sup> respondents could still refuse to consider an applicant eligible for tax exemption on the basis that the same had not been provided for in the allocation of public resources under section 42 (c) of the *Persons Living with Disability Act*, an argument that was also shared by the 3<sup>rd</sup> Respondent herein.
27. The 1<sup>st</sup> respondent denied having received any recommendation based on an application by the ex-parte applicant from the 2<sup>nd</sup> respondent to determine whether or not she was eligible for renewal of the tax exemption. It pointed out that it had therefore not refused to make any administrative decision warranting the orders of mandamus against it and only the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had a stake in that matter.
28. It submitted that the present proceedings did not disclose a cause of action against it as the ex parte applicant had expressed general allegations that the respondents had refused to renew her tax exemption certificate. It thus urged the court to strike it off as a party herein as the ex-parte applicant had not demonstrated a claim against it.



29. On its part, the 3<sup>rd</sup> respondent invoked section 3, 7 (c) and 35 of the *Persons With Disabilities Act* No 14 of 2003 and section 4 of the *legal notice no 36 of March 26, 2010* and argued that it was clear that it was the function of the 1<sup>st</sup> respondent in consultation with the 2<sup>nd</sup> respondent to assess the suitability of any applicant for exemption of payment of taxes. It added that the *ex-parte* applicant could not therefore by pass the functions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and purport to use the court to compel it to renew her tax exemption certificate.
30. It argued that a tax exemption was not absolute. In that respect, it referred to section 42 (1) (c) of the *Persons Living With Disability Act* which provided that an exemption or deduction may be refused on the basis that it had not been provided for in the allocation of public resources. It added that the duty of the 1<sup>st</sup> respondent was a unique one which invited it to intervene on the constitutional duty of everyone to pay taxes.
31. It was emphatic that the *ex parte* applicant had not demonstrated how it had acted unreasonably or in excess of its powers as guided by the statute. It was emphatic that no cause of action lay against it.
32. It argued that it was evident from the documents that were relied upon by the *ex-parte* applicant that there was a pending dispute as regards the extent of her disability and as to whether she had met the threshold required for tax exemption, which dispute ought to be resolved before an order of *mandamus* could be issued. It was added that there was no evidence to show that a prior recommendation by the 2<sup>nd</sup> respondent had been given.
33. It was emphatic that this court could not therefore usurp the 1<sup>st</sup> respondent's role and duty as regards the issue of tax exemption certificates as it was not seized of the facts and information to be able to compel the 1<sup>st</sup> respondent to make such an order especially in light of the conditions set out in section 42 of the *Persons Living with Disability Act*.
34. It cited the case of *Republic v Kenya Revenue Authority Ex parte Bata Shoe Company (Kenya) Limited* [2014] eKLR where the court held that payment of tax was an obligation imposed by the law and thus argued that the order for refund of the monies that had it had already deducted could not issue as it would be contra statute.
35. It pointed out that in the absence of a tax exemption certificate, the *ex-parte* applicant had a statutory duty to pay tax from her income, which was lawfully deducted by her employer in line with section 37 of the *Income Tax Act*. It added that the *ex-parte* applicant was obligated to pay tax under section 3 (2) (a) (ii) and section 5 of the *Income Tax Act* in this case PAYE, from the income she received from employment.
36. It pointed out that unless the 2<sup>nd</sup> respondent recommended renewal of her tax exemption certificate and backdated the same, then it could not be compelled to refund any tax collected thus far when the certificate had not been renewed.
37. Having considered the applicant's notice of motion application, affidavit evidence and parties' written submissions herein, it appeared to this court that the main issue for determination before it was whether or not the order of *mandamus* that had been sought by the *ex-parte* applicant against the respondents herein could issue in the circumstances of this case.
38. An order of *mandamus* will issue to compel a person or body of persons who have failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. It is a judicial command requiring the performance of a specified duty which has not been performed that is employed to compel the performance thereof.



39. It cannot be employed to direct the exercise of judgment or discretion in a particular way or to direct the retraction or reversal of action already taken in the exercise of either as was held in the case of *Republic v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another* [2018] eKLR.
40. This court had due regard to the case of *Republic v Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants* [2007] 2 EA 441 where it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply before an order of mandamus can be granted were set out in the case of *Republic v Cabinet Secretary for Treasury & another Ex-parte Theresa Ongore Auma; Kenya Revenue Authority (Interested Party)* (Supra).
41. Notably, section 35 of the *Persons Living With Disability Act* No 14 of 2003 provides that:
1. All persons with disabilities who are in receipt of an income may apply to the minister responsible for finance for exemption from income tax and any other levies on such income.
  2. The minister responsible for finance may, by notice in the gazette, prescribe the procedure for application for and grant of exemption under this section.
  3. Materials, articles and equipment, including motor vehicles, that are modified or designed for the use of persons with disabilities shall be exempt from import duty, value added tax, demurrage charges, port charges and any other government levy which would in any way increase their cost to the disadvantage of persons with disabilities.
  4. All goods, items, implements or equipment donated to institutions and organizations of or for persons with disabilities shall be exempt from import duties, value added tax, demurrage charges, port charges and any other government levy which would in any way defeat the purposes of or increase the cost of the said donations.”
42. Further, section 42 of the *Persons Living With Disability Act* stipulates the conditions and procedures that apply prior to grant of the said exemptions as follows:
1. The following apply with respect to exemptions and deductions described in subsection (2)—
    - a. no person is eligible for an exemption or deduction unless the exemption or deduction has been recommended by the council and approved by the appropriate government authority;
    - b. no person is eligible for an exemption or deduction unless any additional requirements or conditions prescribed in the regulations made by the minister are satisfied;
    - c. an exemption or deduction may be refused on the basis that it has not been provided for in the allocation of public resources.
  2. The exemptions and deductions referred to in subsection (1) are the exemptions and deductions under the following— (a) section 12; (b) section 16; (c) section 35; (d) section 36(1); and (e) section 40.”
43. In addition, section 4 of Legal Notice 36 of 2010 (*The Persons with disabilities (Income Deductions and Exemptions Regulations)*) cited by the 1<sup>st</sup> respondent hereinabove, states as follows:
1. A person with disability may apply for exemption from income tax to the commissioner through the council in form 1 set out in the schedule.



2. The exemption under sub-paragraph (1) shall apply to the first one hundred and fifty thousand shillings of the total income per month.
  3. The council shall establish a committee, whose members shall include a medical doctor, for the purposes of vetting applications for tax exemption.
  4. The council shall after vetting an application for tax exemption, give a recommendation in form 2 set out in the schedule to the commissioner.”
44. This court scrutinised the supporting documents that were relied on by the *ex parte* applicant and observed that indeed the medical documents acknowledged that she was a person with disability whose tax exemption status ought to be considered.
45. There was nothing on record to show that the 2<sup>nd</sup> respondent recommended the *ex parte* applicant for tax exemption and/or communicated to her or to the 3<sup>rd</sup> respondent of the said tax exemption as was contemplated under section 4 of Legal Notice 36 of 2010 (*The Persons with Disabilities (Income Deductions and Exemptions Regulations)*) upon which the 1<sup>st</sup> and 3<sup>rd</sup> Respondent could act.
46. This court could not by-pass the 2<sup>nd</sup> respondent’s decision and proceed to compel or direct the 3<sup>rd</sup> respondent to renew the *ex parte* applicant’s tax exemption certificate as she had sought herein. it was this court’s considered view that it could not substitute its decision with the decision of the decision maker where there was no such decision which would form the basis of an order of mandamus.
47. The 3<sup>rd</sup> respondent therefore acted correctly when it did not grant the *ex parte* applicant tax exemption status. indeed, this exemption was a privilege and not automatic, the condition precedent being the recommendation of such exemption by the 2<sup>nd</sup> respondent herein.
48. In the circumstances, it would be wrong for this court to proceed to grant an order of mandamus against the 1<sup>st</sup> and 3<sup>rd</sup> respondents as they could only consider and grant an application for tax exemption on the basis of a recommendation from the 2<sup>nd</sup> respondent, which recommendation was lacking herein.
49. In the circumstances foregoing, this court found that the *ex-parte* applicant had failed to satisfy this court that she was entitled to a grant of orders of mandamus against any of the respondents.

### **Disposition**

50. For the foregoing reasons, the upshot of this court’s decision was that the *ex parte* applicant’s notice of motion application dated April 7, 2021 and filed on April 12, 2021 was not merited and the same be and is hereby dismissed.
51. As the respondents are government entities and it would be unjust to grant costs against a citizen, each party will bear its own costs of this cause.
52. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2022**

**J. KAMAU**

**JUDGE**

