



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC APPLICATION NO. E056 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND DECLARATION

BETWEEN

DANIEL NJIRU NGAI.....APPLICANT

VERSUS

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

RULING

1. The Applicant herein, Daniel Njiru Ngai, is a male adult who works for gain and resides in Nairobi county, while the 1st and 2nd Respondents are statutory bodies established under the Persons with Disabilities Act, No. 14 of 2003 and Kenya Revenue Authority Act respectively. The Applicant is seeking orders to be granted leave to commence judicial review proceedings by way of a Chamber Summons application dated 8th July 2020 as follows:

- a) Leave for an Order of Mandamus compelling the 1st Respondent, National Council for Persons with Disabilities to issue a recommended letter in the name of the Applicant herein, to the Commissioner of Income Tax, the 2nd Respondent for processing and exemption.
- b) Leave for an Order of Certiorari to move the High Court to remove into this Court and quash the decision of the 1st Respondent declaring the application for tax exemption unsuccessful.
- c) Leave be granted to the Application to apply for an order of Mandamus compelling the 2nd Respondent to issue the Applicant with a tax exemption certificate.
- d) Leave for a Declaration that the National Council for Person with Disabilities, the 2nd Respondent herein is in breach of its duty under section 35 (2) and 42 of the Person with Disability Act, No. 14 of 2003.
- e) Leave be granted to the Applicant to apply for a Declaration that the National Council for Person with Disabilities is in breach of its duty under Section 35 (2) of the Person with Disability Act, No. 14 of 2003.
- f) Further or in the alternative damages arising from the matter herein and interest thereon.
- g) The Leave so granted do operate as stay of the revocation and/or lapse of the Applicant's tax exemption status pending the filing, hearing and determination of the substantive application.
- h) The Applicant hereby requests a hearing of this application before the Judge pursuant to Rule 3 of Order 53 of the Civil procedure Act
- i) If leave to apply is granted, a direction that the hearing of the Application for judicial review be expedited.
- j) The Costs of this Application be provided for.

2. This Court directed that the said application be canvassed inter parties by way of written submissions. The grounds upon which the Chamber Summons is based appear on the face of the application, a Statutory Statement dated 8th July 2020, and a supporting affidavit sworn on the same date, and a supplementary affidavit sworn on 19th November 2020 by the Applicant. The 1st Respondent did not file any response to, or participate in the hearing of the application, while the 2nd Respondent filed a replying affidavit sworn on 13th December 2020 by Joash Kamollo, an officer of the 2nd Respondent's Domestic Taxes Department. The averments made by the parties in support of their respective cases are set out herein below.

The Applicant's Case

3. The Applicant deponed that he is a person with disability as a consequence of a road accident on or about 2006 which occasioned him severe injuries and resulted in total hip replacement, and that as a consequence, he suffered several mobility challenges, sitting and sleeping difficulties. Further, that as a result, he was registered as a person with disability and a holder of Person with Disabilities Card Number, a copy of which he annexed, together with copies of his medical reports.

4. The Applicant's case is that he was previously recommended and approved for Income Tax Exemption by the 1st Respondent, and that he applied for his Income Tax Exemption Certificate when it expired, which application was rejected by the 1st Respondent on the grounds that he did not meet the requisite threshold. Further, that he made an appeal vide letter dated 20th October 2019, and also sought an explanation through his advocate, but that he has not been given any reasons for the decision.

5. According to the Applicant, under Article 47 of the Constitution and the Fair Administrative Action Act, Act No. 4 of 2015, if a right or fundamental freedom of a person is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action. Further, that it was his legitimate expectation that upon complying with the requirements and procedure set out by law, he would be recommended by the 1st Respondent herein for grant of Certification of exemption for income tax by the 2nd Respondent. Therefore, that the 1st Respondent's administrative action of declining his application for renewal of tax exemption was unlawful, arbitrary, unreasonable and unprocedurally unfair.

The 2nd Respondent's Case

6. The 2nd Respondent raised a preliminary object *in limine* on points of law for the following reason:

- a) The application was incompetent, legally unsuitable and amounts to forum shopping and as such an abuse of the Court process
- b) That the Court lacks jurisdiction to hear the matter at this time on the grounds that there exists statutory dispute resolution mechanism under Legal Notice 36 of 2010.
- c) This case is fatally defective as it offences the mandatory provisions of Section 9 (2), (3) and (4) of the fair administrative Act, No. 4 of 2015.
- d) This matter for application of mandamus as against the 2nd Respondent is therefore fatally defective for want of compliance.

7. The 2nd Respondent stated that it is the lead agency in tax collection, and issues applicants with tax exemption after they have met criteria set by the law, Ministry of Health and the National Council for Person with Disability (NCPWD). The 2nd Respondent explained the applicable procedures for tax exemption including the vetting process, and averred that it was prudent for the Ministry of Health to be enjoined in these proceedings because it is their medical expertise and knowledge of disabilities that informs the issuance or non-issuance of the tax exemptions, and they are part of the vetting committee who examine the extent of the disabilities of applicants and ensure that the criteria set by the Person with Disabilities Act, 2004 and Legal Notice Order No. 36 of 2010 is met. In addition, that the Cabinet Secretary, National Treasury ought to be enjoined because Appeals from the vetting committee lie with the office.

8. According to the 2nd Respondent, the Applicant was vetted by the Ministry of Health but he was not successful, and he should have appealed to the Cabinet Secretary, National Treasury, who would then appoint an independent panel as per Legal Notice Order 36 of 2010. Therefore, that the Applicant failed to follow the due process, and his application was rejected at the vetting level even before it reached the 2nd Respondent.

The Determination

9. The Applicant filed submissions dated 2nd February 2021, while the 2nd Respondent filed submissions dates 15th April 2021, wherein the above arguments were reiterated. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The main reason for the said leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

10. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) **whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;**

- (2) whether the claimant has capacity to bring a claim for judicial review;
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;
- (4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;
- (5) whether the claim is otherwise an abuse of process;
- (6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;
- (7) whether the claim has been brought promptly;
- (8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

11. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Other grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

12. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in Sharma vs Brown Antoine (2007) 1 WLR 780, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

13. In the present application, the *ex parte* Applicant has provided evidence of his application to the 1st Respondent for renewal of his income tax exemption. He has also averred as to why he considers the Respondents' actions to be unlawful. The 2nd Respondent on the other hand alleges that the Applicant has not exhausted the appeals mechanism set out in Legal Notice 36 of 2010.

14. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, as stated in Speaker of National Assembly vs Karume (1992) KLR 21 and Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR

15. It is however notable that the alternative remedy in paragraph 7 of Legal Notice 36 of 2010 is only available against the decision of the Commissioner of Income Tax, who and when upon receiving a recommendation from the 1st Respondent to exempt an applicant from tax, denies or refuses to do so under paragraph 6(4). The said paragraphs provide as follows:

6. Determination of application for exemption.

- (1) The Commissioner shall within thirty days of receipt of a recommendation from the Council under paragraph 4(4) determine the application for tax exemption.**
- (2) The Commissioner may request for any other information that he may consider necessary to facilitate the determination of an application, including requiring the applicant to appear before him for an interview.**
- (3) Where the exemption is granted, the Commissioner shall issue a tax exemption certificate to the applicant.**
- (4) Where the exemption is not granted, the Commissioner shall, within thirty days of receipt of the application, notify the applicant of the denial in writing.**

7. Appeals.

An applicant may appeal to the Minister through the Council against the decision of the Commissioner made under paragraph 6(4), within thirty days of receiving the notification of the decision.

16. On the other hand, the procedure for applications before the 1st Respondent is in paragraph 4 of the said Legal Notice as follows:

4. Application for tax exemption.

- (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.

17. The recommendation envisaged and provided for in Form 2 of the Schedule is for tax exemption, and no internal review or appeals mechanism exists where, as in the present circumstances, the 1st Respondent declines to recommend an applicant for tax exemption. The Applicant is therefore not precluded from approaching this Court to review the 1st Respondent's decision in such a circumstance.

18. In any event, even if the procedure in paragraph 7 was applicable to the present circumstances, the Applicant has brought evidence to show that he did comply. In this regard, it is notable that the 1st Respondent's officer, in the email dated 2nd October 2019 communicating the decision of the vetting committee that the Applicant did not meet the threshold for grant of Tax Exemption, informed the Applicant as follows:

“Should you be aggrieved by the decision of the Committee, you may prefer an appeal to the Cabinet Secretary, National Treasury and Planning through the Executive Director, National Council of Persons with Disabilities within 30 days from the date of this email giving reasons why the Appeal”

19. The Applicant subsequently duly made his appeal through a letter to the said Cabinet Secretary as advised, a copy of which he annexed as Annexure “DN3”. To this extent the 2nd Respondent's objection therefore fails, and this Court finds that the Applicant has demonstrated an arguable case.

The Disposition

20. Arising from the foregoing reasons, the Applicant's Chamber Summons dated 8th July 2020 is found to be merited, and I accordingly order as follows:

I. The Applicant is granted leave to apply for an order of Mandamus compelling the 1st Respondent, National Council for Persons with Disabilities, to issue a recommended letter in the name of the Applicant herein, to the Commissioner of Income Tax, the 2nd Respondent for processing and exemption.

II. The Applicant is granted leave to apply for an Order of Certiorari to move the High Court to remove into this Court and quash the decision of the 1st Respondent declaring the application for tax exemption unsuccessful.

III. The Applicant is granted leave to apply for an order of Mandamus compelling the 2nd Respondent to issue the Applicant with a tax exemption certificate.

IV. The Applicant is granted leave to apply for a Declaration that the National Council for Person with Disabilities is in breach of its duty under section 35 (2) and 42 of the Person with Disability Act, No. 14 of 2003.

V. The Applicant is granted leave to further or in the alternative apply for damages arising from the matter herein and interest thereon.

VI. The costs of the Chamber Summons dated 8th July 2020 shall be in the cause.

VII. The Applicant shall file and serve the substantive Notice of Motion within twenty-one (21) days of today's date.

VIII. A mention date of the Applicant's substantive Notice of Motion shall be given by the Judge seized of this matter.

21. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2021

J. NGAAH

JUDGE