



**HKK v National Council for Persons with Disability & another (Constitutional  
Petition E008 of 2021) [2023] KEHC 2418 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CONSTITUTIONAL PETITION E008 OF 2021**

**EM MURIITHI, J**

**MARCH 23, 2023**

**IN THE MATTER OF ARTICLES 21(1)(3), 22(1), 23(1)(3)(A)-(F), 24(1)(A)-  
(E)(3), 27(1)(4), 28, 29(D)(F), 36(A)(B) AND 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTIONS 2, 3 AND 7(C)  
(1) OF THE PERSONS WITH DISABILITIES ACT, 2003**

**AND**

**IN THE MATTER OF REGULATIONS 5(1) AND 8(1) OF  
THE PERSONS WITH DISABILITY REGULATIONS, 2009**

**AND**

**IN THE MATTER OF VIOLATION AND THREATENED VIOLATION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER (INTER ALIA)  
ARTICLES 21(1)(3), 22(1), 23(1)(3)(A)-(F), 24(1)(A)-(E)(3), 27(1)(4), 28, 29(D)  
(F), 36(A)(B), 54(1), 165(3)(A)(B) AND 260 OF THE CONSTITUTION**

**BETWEEN**

**HKK ..... PETITIONER**

**AND**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITY 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## **Refusal to register a person with disability and declining to grant them tax exemption amounts to denial of protection of the law, dignity and respect**

*The petitioner's application for the renewal of her expired disability registration certificate was declined by the National Council for Persons with Disability. The court held that in refusing registration and tax exemption of a person who had been medically certified as a person with disability, that person had been denied protection of the law, dignity and respect as prescribed for persons with disabilities pursuant to articles 27, 28 and 54 of the Constitution.*

Reported by Kakai Toili

**Constitutional Law** – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – rights of persons with disabilities – registration of persons with disabilities - whether refusal to register a person medically certified as a person with disability by the National Council for Persons with Disabilities and declining to grant them a tax exemption amounted to denial of protection of the law, dignity and respect as prescribed in the Constitution – Constitution of Kenya, 2010, articles 27, 28 and 54; Persons with Disabilities Act, No 14 of 2003, section 7.*

### **Brief facts**

On or around August 8, 2013, the petitioner was assessed by a medical doctor and certified to be a person living with a permanent disability on account of suffering from severe secondary *osteoarthritis* which was irreversible. On or around October 30, 2013, the petitioner was registered as a person living with disability and enjoyed all the legal benefits afforded to such people for the next 5 years. On or around January 2019, the petitioner applied for the renewal of her expired disability registration certificate.

The petitioner claimed that her application was unlawfully, unreasonably and unjustifiably declined by the 1<sup>st</sup> respondent. The petitioner further claimed that the actions of the 1<sup>st</sup> respondent had hindered her from enjoying the right to be exempted from paying income tax. The petitioner therefore sought for among other orders; a declaration that she was a person with disability; and a declaration that the 1<sup>st</sup> respondent's refusal to renew her registration as a person with disability violated her rights as guaranteed by the Constitution.

### **Issues**

Whether refusal to register a person medically certified as a person with disability by the National Council for Persons with Disabilities and declining to grant them a tax exemption amounted to denial of protection of the law, dignity and respect as prescribed in the Constitution.

### **Held**

1. A certificate of registration was only valid for 5 years, after which it was subject to renewal by the 1<sup>st</sup> respondent. Disability was defined under section 2 of the Persons with Disabilities Act to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacted adversely on social, economic or environmental participation. On January 24, 2019, the petitioner was certified by a qualified doctor to be a person with permanent physical disability and thus eligible for registration as a person with disability.
2. The functions of the 1<sup>st</sup> respondent were listed under section 7 of the Persons with Disabilities Act to include registration of persons with disabilities. The 1<sup>st</sup> respondent contravened the provisions of the Constitution and the Persons with Disabilities Act in refusing to renew the petitioner's certificate of registration after its expiry, even after she had furnished all the requisite documentation in support of her application. The refusal to renew the petitioner's certificate of registration denied her the benefits that accrued to persons with disabilities.
3. After the petitioner's application for renewal of her tax exemption certificate was rejected by the 1<sup>st</sup> respondent, she duly lodged an appeal to the Cabinet Secretary as required by the provisions of order 7



- of the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010. The petitioner had no control over the appeal process.
4. In refusing the petitioner's registration and tax exemption under the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010, the petitioner, who had been medically certified as a person with disability, had been denied protection of the law, dignity and respect as prescribed for persons with disabilities pursuant to articles 27, 28 and 54 of the Constitution. On the evidence, the petitioner's rights to freedom and security of the person and of association respectively under articles 29 and 36 of the Constitution had not been denied.
  5. The petitioner had demonstrated on a balance of probabilities that the 1<sup>st</sup> respondent's unjustifiable actions of refusing to renew her registration certificate violated rights under articles 27, 28, and 54 of the Constitution. The medical evidence of the petitioner's doctor as to the status of the petitioner was not rebutted by any evidence on the part of the respondent.
  6. The prayer for compensation was declined because the petitioner had not adduced any evidence of any income tax so far paid to the Government after the expiry of certificate of registration.

*Petition partly allowed; no order as to costs.*

### **Orders**

- i. *A declaration was issued that the petitioner was a person with disability within the provisions of section 2 of the Persons with Disabilities Act and article 260 of the Constitution.*
- ii. *A declaration was issued that the 1<sup>st</sup> respondent's unlawful, unreasonable and unjustifiable refusal to renew the petitioner's registration as a person with disability violated her rights as guaranteed by articles 21, 27, 28 and 54 of the Constitution.*
- iii. *A declaration was issued that the 1<sup>st</sup> respondent had eschewed its responsibilities as contemplated by sections 3 and 7(c)(i) of the Persons with Disabilities Act, 2003 and regulations 5(1) and 8(1) of the Persons with Disability (Registration) Regulations by refusing to renew the petitioner's registration as a person with disability.*
- iv. *An injunction was issued restraining the 1<sup>st</sup> respondent whether acting directly or through third parties, agents and/or proxies, from illegally or unfairly suspending, terminating and/or otherwise removing the petitioner's name from the register of people with disability.*
- v. *An order of mandamus was issued compelling the 1<sup>st</sup> respondent to renew the petitioner's registration as a person with disability.*

### **Citations**

#### **Cases**

1. Anarita Karimi Njeru v Republic (Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR); [1976-80] 1 KLR 1272) — Mentioned
2. East Africa Portland Cement Company Ltd v Attorney General & Another (Petition 9 of 2012; [2013] KEELRC 225 (KLR)) — Explained
3. Kamau & 5 others v Kenya Ports Authority & 4 others; National Council for Persons with Disabilities & another (Interested Parties) (Constitutional Petition 21 of 2016; [2016] KEHC 2420 (KLR)) — Explained
4. Kyangavo v Kenya Commercial Bank Ltd & another (Civil Case 428 of 2001; [2004] eKLR) — Explained
5. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Explained
6. Miano, Anthony & others v Attorney General & others ([2021] eKLR) — Explained
7. Obando, vJane Angila Teachers Service Commission & 2 others (Constitutional Petition 4 of 2020; [2020] KEELRC 795 (KLR)) — Explained

#### **Statutes**



1. Constitution of Kenya, 2010 — article 1, 21(1)(3); 24; 27(4); 28; 29(d)(f); 36(3)(a)(b); 54(1); 260 — Interpreted
2. Persons With Disabilities Act, 2003 (Act No 14 of 2003) — section 2; 3; 7 (c) (i) — Interpreted
3. Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010 (Act No 14 of 2003 Sub Leg) — order 3, 7 — Interpreted
4. Persons with Disabilities (Registration) Regulations, 2009 (Act No 14 of 2003 Sub Leg) — regulation 5 (1); 8 (1) — Interpreted

#### **Advocates**

*M/S. Gichunge Muthuri & Co. Advocates* for Petitioner.

*Ms. E. Kendi Senior Litigation Counsel* for Respondents.

### **JUDGMENT**

1. The petitioner, an employee of Meru County Government in the Department of Health working as a nurse, filed a petition dated 22/4/2021 seeking specific reliefs as follows:
  1. A declaration that the petitioner is a person with disability as per s 2 of the *Persons With Disabilities Act, 2003* and article 260 of the *Constitution*, 2010.
  2. A declaration that the 1<sup>st</sup> respondent unlawful, unreasonable and unjustifiable refusal to renew the Petitioner’s registration as a person with disability violated her rights as guaranteed by articles 21, 24, 27, 28, 29, 36, 54 and 260 of the *Constitution of Kenya, 2010*.
  3. A declaration that the 1<sup>st</sup> respondent has eschewed its responsibilities as contemplated by sections 3 and 7(c)(i) of the *Persons With Disabilities Act, 2003* and regulations 5(1) and 8(1) of the *Persons with Disability (Registration) Regulations* by refusing to renew the petitioner’s registration as a person with disability.
  4. An injunction restraining the 1<sup>st</sup> respondents whether acting directly or through third parties, agents and/or proxies, from illegally or unfairly suspending, terminating and/or otherwise removing the petitioner’s name from the register of people with disability.
  5. Compensation for the loss of income tax occasioned by the 1<sup>st</sup> respondent’s refusal to renew the Petitioner’s registration as a person with disability thus precluding her from enjoying exemption from paying income tax that she is entitled to as a person with disability.
  6. Compensation for the psychological torture, mental anguish and distress occasioned by the 1<sup>st</sup> respondent’s callous, cruel and inhumane refusal to renew the petitioner’s registration as a person with disability.
  7. An order of mandamus compelling the 1<sup>st</sup> respondent to renew the petitioner’s registration as a person with disability.
  8. The costs of and incidental to this petition.
  9. Interest on (e, f and h) above at court rates from the date of filing this petition to the date of full and final settlement.



10. Such other, further, incidental or alternative reliefs as the honourable court may deem just and expedient.

### **Petitioner's Case**

2. On or around 8/8/2013, the petitioner was assessed by a medical doctor and certified to be a person living with a permanent disability on account of suffering from severe Secondary Osteoarthritis which is irreversible. On or around October 30, 2013, the petitioner was registered as a person living with disability and enjoyed all the legal benefits afforded to such people for the next 5 years as per the Persons with Disability (Registration) Regulations, 2009. On or around January 2019, the petitioner applied for the renewal of her expired disability registration certificate upon re-assessment by a medical doctor which established that she was still a person living with permanent disability due to the double hip replacements she had undergone that left her with a waddling gait, inability to walk fast, bent or perform other physical activities and reliant on elbow clutches to aid her walking. That application was unlawfully, unreasonably and unjustifiably declined by the 1<sup>st</sup> respondent, to her detriment. The 1<sup>st</sup> respondent's conduct violates sections 2 and 7(1)(c) of the Persons With Disabilities Act, 2003, regulations 5(1) and 8(1) of the Persons with Disability (Registration) Regulations and articles 21(1)(3), 24, 27(4), 28, 29(d)(f), 36(3)(a)(b), 54(1) and 260 of the Constitution.
3. The actions of the 1<sup>st</sup> respondent have hindered the petitioner's right to be exempted from paying income tax and jeopardized her livelihood by rendering her ineligible to retire at 65 years, as she is no longer in the Register of persons living with disability. The 1<sup>st</sup> respondent's refusal to renew her registration has caused her untold psychological torture, mental anguish, distress and jeopardized her employment with Meru County Government and put her in a precarious financial position as she is already 62 years, while the usual retirement age is 60 years.

### **The Respondents' Case**

4. The respondents opposed the petition by their replying affidavit sworn by Isaac Manyonge, the Disability Service Officer of the 1<sup>st</sup> respondent, on 6/7/2022. He avers that the petitioner is duly registered as a person with disability Registration No NCPWD/P/XXXXXX. He avers that the 1<sup>st</sup> respondent has never revoked nor refused to renew the said registration. He avers that once a person is issued with a disability card, which does not have an expiry date, they become a member, but registration does not guarantee tax exemption. He avers that the petitioner's application for renewal of her Tax Exemption Certificate was rejected by the Vetting Committee established under the Persons with Disabilities (Income Tax Deductions and Exemptions) Order 2010, after the petitioner was found to have been well rehabilitated and had no significant functional limitation. He avers that the petitioner did not prefer an appeal against the Vetting Committee's decision to the Cabinet Secretary National Treasury and Planning as provided under the Persons with Disabilities (Income Tax Deductions and Exemptions) Order. He avers that the court lacks jurisdiction to entertain this petition as the petitioner has not exhausted the avenues provided for under the law before bringing the matter to court. According to him, the petitioner has neither demonstrated with precision how her fundamental rights and freedoms under the Constitution have been violated or are threatened nor produced any evidence to prove the alleged violations, and cites Mumo Matemu v Trusted Society of Human Rights Alliance (2013) eKLR and Annarita Karimi Njeru (1979) KLR 154. He prays for the dismissal of the petition with costs.



## The 2<sup>nd</sup> Respondent's Case

5. The 2<sup>nd</sup> respondent filed grounds of opposition dated 14/3/2022 urging principally that “The petition is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances; The petitioner herein does not disclose a reasonable cause of action against the 2<sup>nd</sup> respondent for the reason that the 1<sup>st</sup> respondent is a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of suing and being sued and acquiring and holding and disposing movable and immovable property; and the 2<sup>nd</sup> respondent is therefore non-suited and ought to be struck out of the suit.”
6. The petitioner swore a further supporting affidavit on 19/9/2022 averring that she indeed appealed against the 1<sup>st</sup> respondent's decision not to renew her tax exemption to the Cabinet Secretary on 5/8/2019.

## Submissions

7. The petitioner urges that having been assessed by a qualified doctor and certified as a person living with disability, there was no basis to deny her registration with the 1<sup>st</sup> respondent and the attendant benefits. She urges that the responsibility to assess disability and the extent is by medical doctors, and the 1<sup>st</sup> respondent cannot usurp that responsibility. She urges that she risks losing the benefits and being surcharged for working and drawing salaries beyond 60 years when she is not registered as a person living with disability. She further urges that she risks losing her terminal benefits to KRA who will demand back tax for the period worked when she is not registered as a person living with disability. She urges that the actions by the 1<sup>st</sup> respondent to deny her the registration had attendant consequences, was illegal and in contravention of her rights. She urges that since the petition is not opposed, it should be allowed as prayed.
8. The respondents submit that even if the 1<sup>st</sup> respondent considers an applicant eligible for tax exemption, the same can still be declined on the basis that it has not been provided for in the allocation of public resources under section 42(1)(c) of the *Persons With Disabilities Act, 2003* and, therefore, relegates a tax exemption to a right that is not absolute.
9. The respondents urge that the threshold for grant of tax exemption is that the disability must be one that has an adverse impact or effect on the person's performance of day to day duties and not just mere disabilities, and the refusal to renew the petitioner's tax exemption was done lawfully. They urge that the petitioner has failed to prove that her constitutional rights have been infringed and cite *East Africa Portland Cement Company Ltd v Attorney General & Another* (2013) eKLR and *Jane Angalia Obando v TSC & 2 others* (2020) eKLR. They accuse the petitioner of contravening the doctrine of exhaustion before bringing the matter to court, citing *Anthony Miano & others v Attorney General & others* (2021) eKLR and *Kyangaro v Kenya Commercial Bank Ltd & Another* (2004) eKLR.
10. The respondents finally urge that the petition ought to be dismissed with costs, as it has not been pleaded with a reasonable degree of precision in conformity with the principles in *Anarita Karimi Njeru v Republic* (supra) and *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others* (2016) eKLR.

## Analysis and Determination

11. Having considered the petition, the responses thereto and the submissions on record, the issue for determination is whether the petitioner's rights were violated by the 1<sup>st</sup> respondent actions subject of the petition.



12. Regulation 5 of the *[Persons with Disabilities \(Registration\) Regulations, 2009](#)* provides that:
- “(1) A person with a disability may apply to have his or her name and particulars entered in the register of persons with disabilities.”
13. Regulation 7 of the *[Persons with Disabilities \(Registration\) Regulations, 2009](#)* provides that:
- “(1) The Council shall consider an application made under regulation 4, and may make such enquiries as it may consider necessary and, where it is satisfied that the applicant has complied with the requirements of these regulations, it shall register the applicant and issue a certificate of registration which shall be in form 2 set out in the schedule.”
14. Regulation 8 of the *[Persons with Disabilities \(Registration\) Regulations, 2009](#)* provides that:
- “(1) A certificate of registration issued under these Regulations shall, unless earlier suspended or revoked, be in force for a period of five years from the date of issue, and may thereafter be renewed for periods not exceeding five years at any one time.”
15. It is true that a Certificate of Registration is only valid for 5 years, after which it is subject to renewal by the 1<sup>st</sup> respondent. The petitioner avers that after the expiry of her certificate of Registration, which had been issued on October 30, 2013, she duly applied for renewal which was unlawfully, unreasonably and unjustifiably rejected by the 1<sup>st</sup> respondent. In their defence, the respondents contend that a Certificate of Registration is issued once and it does not have an expiry date.
16. Disability is defined under section 2 of the *[Persons with Disabilities Act](#)* to mean a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation. There is no dispute that on 24/1/2019, the petitioner was certified by a qualified doctor to be a person with permanent physical disability and thus eligible for registration as a Person with Disability.
17. The functions of the 1<sup>st</sup> respondent are listed under section 7 of the *[Persons with Disabilities Act](#)* to include registration of Persons with Disabilities.
18. This court finds that the 1<sup>st</sup> respondent contravened the provisions of the *[Constitution](#)* and the *[Persons with Disabilities Act](#)* in refusing to renew the petitioner’s certificate of Registration after its expiry, even after she had furnished all the requisite documentation in support of her application. The said refusal to renew the petitioner’s certificate of registration denied her the benefits that accrue to persons with disabilities.
19. Order 3 of the *[Persons with Disabilities \(Income Tax Deductions and Exemptions\) Order, 2010](#)* provides that:
- “A person with disability shall not be eligible to apply for tax exemption unless he or she is registered with the Council.”
20. The petitioner further made an application for renewal of her Tax Exemption Certificate, after her previous one had expired. That application was rejected by the 1<sup>st</sup> respondent’s Vetting Committee on the basis that “the petitioner was found to have been well rehabilitated and had no significant functional limitation. Consequently, she did not meet the threshold for grant of Tax Exemption.” As



result of the said refusal for Tax Exemption, it is alleged that the petitioner will lose income in form of taxes. She has thus sought compensation for the loss of income tax occasioned by the 1<sup>st</sup> respondent's refusal to renew her registration as a person with disability.

21. The 1<sup>st</sup> respondent accuses the petitioner of failing to exhaust the remedies available to her before approaching to this court. This court notes that after her application for renewal of her tax exemption certificate was rejected by the 1<sup>st</sup> respondent, she duly lodged an appeal to the Cabinet Secretary as required by the provisions of order 7 of the [Persons with Disabilities \(Income Tax Deductions and Exemptions\) Order, 2010](#). The petitioner has no control over the appeal process.
22. It is conceivable that in refusing the petitioner's registration and tax exemption under the [Persons with Disabilities \(Income Tax Deductions and Exemptions\) Order, 2010](#), the petitioner, who has been medically certified as a person with disability, has been denied protection of the law, dignity and respect as prescribed for persons with disabilities pursuant to articles 27, 28 and 54 of the [Constitution](#). The court does not see how, on the evidence, the petitioner's rights to freedom and security of the person and of association respectively under articles 29 and 36 of the [Constitution](#) have been denied.
23. The court, therefore, finds that the petitioner has demonstrated on a balance of probabilities that the 1<sup>st</sup> respondent's unjustifiable actions of refusing to renew her registration certificate violated rights under articles 27, 28, and 54 of the [Constitution](#). The medical evidence of the petitioner's doctor as to the status of the petitioner was not rebutted by any evidence on the part of the respondent.
24. The prayer for compensation is declined because the petitioner had not adduced any evidence of any income tax so far paid to the Government after the expiry of certificate of registration.

#### Orders

25. Accordingly, for the reasons set out above, the court finds the petition dated 22/4/2021 merited and issues the following orders:
  1. A declaration is hereby issued that the petitioner is a person with disability within the provisions of section 2 of the [Persons with Disabilities Act](#) and article 260 of the [Constitution](#).
  2. A declaration is hereby issued that the 1<sup>st</sup> respondent unlawful, unreasonable and unjustifiable refusal to renew the petitioner's registration as a person with disability violated her rights as guaranteed by articles 21, 27, 28 and 54 of the [Constitution of Kenya](#).
  3. A declaration is hereby issued that the 1<sup>st</sup> respondent has eschewed its responsibilities as contemplated by sections 3 and 7(c)(i) of the [Persons With Disabilities Act, 2003](#) and regulations 5(1) and 8(1) of the [Persons with Disability \(Registration\) Regulations](#) by refusing to renew the petitioner's registration as a person with disability.
  4. An injunction is issued restraining the 1<sup>st</sup> respondent whether acting directly or through third parties, agents and/or proxies, from illegally or unfairly suspending, terminating and/or otherwise removing the petitioner's name from the register of people with disability.
  5. An order of *mandamus* is issued compelling the 1<sup>st</sup> respondent to renew the petitioner's registration as a person with disability.
26. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED ON THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**



**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S. Gichunge Muthuri & Co. Advocates for the Petitioner.

Ms. E. Kendi Senior Litigation Counsel for the Respondents.

