



**Care Mission Kenya v Kenya Revenue Authority & 3 others (Miscellaneous Application 340 of 2019) [2023] KEHC 17318 (KLR) (Judicial Review) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION 340 OF 2019**

**JM CHIGITI, J**

**MAY 11, 2023**

**BETWEEN**

**CARE MISSION KENYA ..... APPLICANT**

**AND**

**THE KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF FINANCE ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF LABOUR AND SOCIAL PROTECTION ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Brief Background**

1. The Applicant, pursuant to leave of court granted on 11<sup>th</sup> March 2020 by Hon. Justice J Mativo, filed its Notice of Motion dated 23<sup>rd</sup> June 2020 - under Section 8 of the [Law Reform Act](#) Order LIII Rule 1 of the [Civil Procedure Rules](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#) – seeking for reliefs:
  - i. That, an Order Of Prohibition to prohibit the Kenya Revenue Authority from imposing income tax in respect of donations to institutions owned by the Applicant in Kenya.
  - ii. That, an Order Of Mandamus compelling the Kenya Revenue Authority to exempt from taxes in respect donations received from donors locally and internationally to assist the less fortunate and vulnerable communities in Kitengela and BUSIA respectively.
  - iii. That, the Order so granted to the ex-parte Applicant be allowed to operate as a stay of the action to levy taxes until hearing and determination of this application.



- iv. That, Costs of this Application be provided for.
2. The Application was supported by a Statutory Statement, and a Verifying Affidavit signed by Oddva Sten Linkas, both dated 27<sup>th</sup> November, 2019. Also filed was a Supporting Affidavit dated 23<sup>rd</sup> June, 2020, signed by Oddva Sten Linkas, a trustee of the Applicant.
3. It is the Applicant's case that the 1<sup>st</sup> Respondent is yet to exempt it (Applicant) from paying taxes in respect of donations to institutions based in Kenya - which includes an ongoing water, health, and education projects in Kitengela under the Administration of Isinya Gender and Social Development.
4. That the Ministry of Finance, and Ministry of Gender Children and Social Development has insisted on Circular No. 1/2008 which relates to payment of taxes by the Government in respect of goods donated to Non-Government Organizations, and charitable institutions; which circular is oppressive, unfair, unconstitutional, abuse of natural justice, and amounts to condemning the Applicant unheard.
5. That the Applicant has the right to administration action that is expeditious, efficient, lawful, reasonable and procedurally fair; and that the Applicant is likely to be adversely affected by the Respondents administrative action, which is without any lawful reason or excuse at all.
6. On legitimate expectation, that the Respondents are circumventing Article 23, 36, 47, 50 and 210 of *the Constitution* of Kenya, as it is only fair and just to waive or vary the tax on the Applicant's goods. Further, that this court has jurisdiction under Article 23(1) and in accordance with Article 23(1) of *the Constitution* to hear and determine applications for redress of a denial, violation, or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.
7. In opposing the Application, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents, through the office of the Attorney General, filed their Grounds of Opposition dated 14<sup>th</sup> June 2020, on the grounds:
  1. That the Application does not lie within the purview of judicial review.
  2. That the Application herein is challenging the merits of the case and not process and yet judicial review concerns the process and not the merits of the case.
  3. That there are no any judicial review orders sought against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents and thus need to be expunged from the proceedings.
  4. That in the circumstances and based on the foregoing reasons, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent should be expunged from these proceedings.
8. In Response, and in further opposition to the Application, the 1<sup>st</sup> Respondent filed its Replying Affidavit dated 4<sup>th</sup> February, 2022 sworn by Charles Oteki, an officer of the Kenya Revenue Authority. The 1<sup>st</sup> Respondent's case is that the Applicant did not make any application for an exemption from income tax, from them (1<sup>st</sup> Respondents), as stipulated by law, for issuance of an exemption certificate to that effect.
9. Further, the 1<sup>st</sup> Respondent averred that it can only issue an exemption certificate - indicating the exempted period - once it is satisfied that an applicant has met the criteria under the law to be granted such an exemption. That even where an application is to be made to any other body, the said body may only make a recommendation to the 1<sup>st</sup> Respondent for the exemption, in accordance with the law.
10. Additionally, the deponent stated that, on perusing the Applicants Application to this court, there is no annexed copy of application for exemption of income tax, and also no attachment of circulars



- referred to by the Applicant, in their filed documents. That the annexed documents do not relate to them (1<sup>st</sup> Respondent).
11. The 1<sup>st</sup> Respondent contended that prayer i, ii, and iii of the subject Notice of Motion Application, cannot be granted by this Honourable Court as the same would be akin to the Court usurping the mandate of the 1<sup>st</sup> Respondent and contrary to article 210 of *the Constitution*.
  12. It was the 1<sup>st</sup> Respondent's position that the judicial review proceedings are concerned with the decision-making process and not the merits of the decision, and where no decision has been made, the alleged legality or propriety of the said decision-making process cannot be challenged through the judicial review process.
  13. That in the instant matter, the Applicant have not applied to the 1<sup>st</sup> Respondent for an exemption from taxes under the *Income Tax Act*, or any other exemption under any tax law, for then to invoke the jurisdiction of this Honourable Court to investigate the 1<sup>st</sup> Respondent's procedural action or inaction.
  14. Therefore, that the 1<sup>st</sup> Respondent has not failed to perform any administrative duty to warrant the prayed judicial review orders. Consequently, that this instant Application is misconceived, premature and abuse of the court process; as the same lacks merit, thus should be struck out and/or be dismissed with costs to the Respondents.
  15. In advancing their cases, the Applicant, and the 1<sup>st</sup> Respondent filed their written submissions dated 12<sup>th</sup> October 2021 and 4<sup>th</sup> February 2022, respectively.
  16. On one hand, in supporting the Application, the Applicant submitted that as investors, the circular dated 19<sup>th</sup> September, 2013 is oppressive, unfair, unconstitutional, and an abuse of natural justice which amounts to condemning the Applicant unheard. In particular, that the said circular contravenes Article 210 of *the Constitution*.
  17. The Applicant stated that the Treasury, through Kenya Revenue Authority, may levy or impose tax in respect of donations to the them (Applicant) should this Honourable Court fail to intervene. That pursuant to Treasury Circular No. 1/2008 relating to payment of taxes by the Government in respect of goods donated to Non-Governmental Organizations and charitable institutions, the Applicant is exposed to massive financial loss, damages, grave prejudice, and may fail to satisfy its objective resulting in material loss to its subjects.
  18. The Applicant posited that its legitimate expectation was violated, as it is a charitable organization - operating water, health, educational, and children's home in assisting the less fortunate and vulnerable communities in Kenya (Busia, and Kitengela) – in regards to Section 27(1) of the *Valuation for Rating Act* Cap 266, and Article 210 of *the Constitution*. That while the Applicant's trustees have made several requests to the Cabinet Secretaries Ministry of Finance, and Ministry of Labour and Social Protection since January 2019, to date, the said authorities are yet to officially waive taxes on the Applicant's goods.
  19. As per the Applicant, the Treasury in its circular dated 19<sup>th</sup> September, 2013, misinterpreted its constitutional mandate by unilaterally, arbitrarily, and without any lawful authority stopped waiving or varying taxes in respect of donations, while it proceeded to selectively waive such tax to various organizations.
  20. The Applicant, in their submissions, maintained that the instant Application is pursuant to them (Applicant) having made a formal request to the Cabinet Secretary Ministry of Labour and Social Protection on 9<sup>th</sup> January, 2019, but where they were advised to make the request to the Treasury, which they (Applicant) made on the same subject on 16<sup>th</sup> August, 2019.



21. That the instant Application seeks to compel the Ministries of Labour and Social Protection, and the Ministry of Finance to do what they are legally duty bound to do; the same being to provide exemption in respect of donations services income to the Applicant.
22. It was the Applicant's submissions that it is apprehensive and prejudiced that the Respondents may proceed adversely, at the massive economic loss and damages to the Applicant. That the High Court has jurisdiction - in accordance with Article 165 of *the Constitution* - to hear and determine applications for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom in the Bill of Rights. In the end, the Applicant beseeched the court to grant the Application as prayed.
23. On the other hand, in opposing the Application, the 1<sup>st</sup> Respondent submitted that the instant Application does not fall within the ambits of judicial review, and thus is unmerited. Reliance was placed on the cases of *Municipal Council of Mombasa Vs Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002)* eKLR which stated the purpose of judicial review, and *Pastoli Vs Kubule District Local Government Canal & Others (2008) 2EA 300* which elaborated the circumstances under which orders of Judicial Review can be issued.
24. That the crux of this matter arises from what the Applicant describes as refusal by the 1<sup>st</sup> Respondent to exempt it from payment of Income tax with respect to donations it receives despite it being a charitable institution.
25. The 1<sup>st</sup> Respondent acknowledges Article 210 of *the Constitution*, and Paragraph 10 of the First Schedule of the *Income Tax Act* which provides for the exemption, and eligibility criteria clause relevant to this instant matter.
26. The 1<sup>st</sup> Respondent maintained that, as per the law, a person or entity whom meets the criteria and is desirous of an income tax exemption, must first apply to the 1<sup>st</sup> Respondent (Kenya Revenue Authority) seeking the same. That then the 1<sup>st</sup> Respondent processes the said application in checking to confirm that the applicant meets the criteria set in law, for granting of the exemption. That once satisfied that indeed the criteria has been met, the 1<sup>st</sup> Respondent issues an exemption certificate which clearly stipulates that a particular taxpayer has been exempted from income tax for a specified period of time, commencing and ending on certain dates. Further, that even where an application is to be made to any other body, the said body must make a recommendation to the 1<sup>st</sup> Respondent for the exemption in accordance with the law.
27. The 1<sup>st</sup> Respondents contends that contrary to the Applicant's allegations, it (the Applicant) has never made any application to 1<sup>st</sup> Respondent, seeking to be exempted from payment of Income Tax; that also no such copy of same application has been placed before this court. Relied on the case of *Kenya Power & Lighting Co Ltd v Rassul Nzembe Mwadzaya [2020]* eKLR where it was stated that where no evidence is tendered to support an averment in a pleading, such averment stands as mere statement.
28. That in absence of such application, the 1<sup>st</sup> Respondent cannot be said to have failed to perform any administrative duty worth the prayed judicial review orders. Also, that the 1<sup>st</sup> Respondent has not made any decision arising from the process, and therefore the process which is actually non-existent cannot be challenged.
29. It is the 1<sup>st</sup> Respondent's position that the instant application is premature, contrary to doctrine of ripeness, and an attempt to have the court usurp their (1<sup>st</sup> Respondent's) statutory powers. The 1<sup>st</sup> Respondent maintained that the Applicant ought to go back and follow the right procedure, for it (1<sup>st</sup> Respondent) to be able to determine such application on its merits. The case of *Republic vs National*



- Employment Authority & 3 Others Ex-parte Middle East Consultancy Services Limited (2018) eKLR was relied upon.
30. Further, it was submitted that, should this court grant the reliefs, as sought by the Applicant, the same would amount to the court usurping the statutory powers of the 1<sup>st</sup> Respondent. Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo v IEBC & 2 Others case was relied on.
  31. It is the 1<sup>st</sup> Respondent position that the Applicant seeks to un-procedurally use this court to curtail its (1<sup>st</sup> Respondent's) constitutional duty of revenue collection. That the law is to the effect unless the Applicant gets the relevant exemption, the Applicant has a duty to pay the taxes in question. That the same has been affirmed by the courts such as in the case of *James Kamau Gitothu Njenda v Commissioner of domestic taxes [2019]* eKLR.
  32. On the alleged Applicant's violation of legitimate expectation, the 1<sup>st</sup> Respondent submitted that the same has not been (attempted to be) explained by the Applicant.
  33. That this court should find guidance from the findings in *Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents-Forum CBO [2019]* eKLR, where the court observed that, the powers of the court to review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. The action or decision complained of must conform to the statutory provisions and must pass the constitutional muster.
  34. In the end, the 1<sup>st</sup> Respondent beseeched this court to dismiss with cost, the Application dated 23<sup>rd</sup> June 2020, for lack of merit.
  35. After a careful consideration of the Application, the responses there, annexures, and the submissions by party's counsel; I find the following issue arising for determination, Whether the Applicant has established grounds or threshold for granting of judicial review orders of mandamus, and prohibition.
  36. The Applicant has sought the remedies of mandamus, and prohibition. An order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct; while an order of mandamus on the other hand requires a public body to do some particular act as specified in the order, to enforce public law duties. The Court of Appeal in the case of *Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997)* eKLR explained the circumstances under which these orders can issue, and they are available where unlawful conduct or a breach of duty has been demonstrated on the party of a public body or official.
  37. It is the Applicants claim that in the instant Applicant, it seeks judicial review orders against the Respondents for failure to act on their letter/application for tax exemption sent to the Ministry of Finance, and Ministry of labour and social development. From the record before this court, there is a letter to the Permanent Secretary Ministry of Finance, dated 10<sup>th</sup> July 2019, from the Applicant, seeking tax exemption pursuant to the Treasury Circular No. 1/2008. From the record before this court, there is no attachment evidence of the Treasury Circular No. 1/2008 for this court to consider.
  38. Additionally, there is no evidence, from the record before this court, that the Applicant made any application to the 1<sup>st</sup> Respondent (Kenya Revenue Authority), for tax exemption; despite the Applicant seeking judicial review orders against the 1<sup>st</sup> Respondent. This demonstrates that the judicial review proceedings against the 1<sup>st</sup> Respondent are premature.
  39. The Applicant seeks orders for mandamus and prohibition. The scope of order of mandamus against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified



duty to do that act. This position was affirmed in the case of *Makupa Transit Shade Limited & Anor Vs. Kenya Ports Authority & Anor [2015]* eKLR, where the observed that,

“What of the Order of mandamus” The general rule is that the issuance of mandamus is limited to where there is specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual. See Halsbury Laws of England 4th ed. Vol. 1. Para 89. Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act. See *Manyasi v. Gicheru & 3 Others*, [2009] KLR 687. However, if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the decision will be exercised. See Halsbury’s Law of England, 4th Ed Vol. 1 in which it is stated that “where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.” The 1st respondent had discretion to refuse or grant permission for the construction of the bridge or even to lease out the plot, this the court cannot dictate upon by issuing the orders sought. The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues.”

40. The scope of prohibition is to forbid inferior body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. Prohibition does not, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. This position was affirmed in the case of *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996*, where the court stated that,

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice... Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

41. Consequently, flowing from the above, neither an order of mandamus nor prohibition is fit to issue, given the circumstances of the instant matter.

**Orders:**

42. The Notice of Motion dated 23<sup>rd</sup> June 2020 Lacks merit and the same is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY, 2023.**

.....

**JOHN CHIGITI (SC)**

**JUDGE**

