



**Kipyegon v National Council for Persons with Disabilities (Judicial Review Miscellaneous Application 146 of 2019) [2023] KEHC 19857 (KLR) (Judicial Review) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 146 OF 2019**

**JM CHIGITI, J**

**JULY 6, 2023**

**BETWEEN**

**DANIEL KIPRUGUT KIPYEGON ..... APPLICANT**

**AND**

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES ... RESPONDENT**

**JUDGMENT**

1. The Applicant is before this Court vide a Notice of Motion application dated 20<sup>th</sup> July, 2022 and filed under Article 47 of *the Constitution* of Kenya, order 53 rule (3) 1 of the *Civil Procedure Rules* and Section 1A, 1B 3 and 3A of the *Civil Procedure Act*.
2. The Application seeks the following orders;
  1. That this Honourable Court be pleased to issue an order of certiorari to remove into the Honourable court and quash the decision of the Respondent through and (sic) email on 5<sup>th</sup> October, 2018 declaring the Applicant's application for renewal of tax exemption unsuccessful.
  2. That this Honourable Court be pleased to issue an order of mandamus compelling the Respondent to recommend the Applicant to the Kenya Revenue Authority for renewal of tax exemption running five years from the last date of expiry to date.
  3. That the costs of this Application be in the cause.
3. The Application is supported by an affidavit dated 20<sup>th</sup> July, 2022 sworn by the Ex parte Applicant.



4. The Ex parte Applicant in his affidavit depones that he was involved in a road traffic accident on 5<sup>th</sup> October, 2002 after which he suffered a fractured right acetabulum with hip dislocation and posttraumatic osteoarthritis on the left hip joint characterized by intermittent pain, stiffness in the joint.
5. He also avers that he was registered as a person with disability by the Respondent under Registration number NCPWD/P/134966 on 5<sup>th</sup>, September 2012 and that on 12<sup>th</sup> November, 2021 he made an application for tax exemption on the grounds of disability.
6. It is deponed that he underwent a medical examination at the National Spinal Injury Hospital which was carried out by a medical committee convened by the Respondent and that the summary of the findings of the medical committee were that he suffered from Left Hip Joint Osteoarthritis, a shortened left leg and lateral lordosis.
7. The committee is also said to have observed that the Ex parte Applicant could not walk for long distance, and further that he was unable to stand for long or even bear heavy loads.
8. That the medical committee subsequently classified the nature of the Ex parte Applicant's disability as "permanent" and consequently recommended to the Respondent his registration as a person with disability.
9. The Respondent is said to have made a recommendation to the Kenya Revenue Authority that the Ex parte Applicant be exempt from taxation on account of his disability and that the Kenya Revenue Authority later issued an income tax exemption certificate in that regard covering a period of five (5) years from the 1<sup>st</sup> July, 2013 to 1<sup>st</sup> July, 2018.
10. The Ex parte Applicant contends that he subsequently after the expiry of the said period made an application for renewal of tax exemption and underwent a medical examination at the Mbagathi Hospital, Nairobi on 29<sup>th</sup> May, 2018 and that the medical committee concluded that he suffered from a permanent physical disability and consequently the Director of Medical services recommended his registration as a person with disability on June 2018.
11. Subsequently on 9<sup>th</sup> August, 2018, he submitted the prescribed Form 2 for the application for renewal of tax exemption to the Respondent for its recommendation of tax exemption to the Kenya Revenue Authority but was on 21<sup>st</sup> September, 2018 directed to undergo further vetting at the Mama Lucy Kibaki Hospital where a superficial physical examination was conducted by the persons in charge.
12. The Respondent it is averred wrote to the Applicant on 9<sup>th</sup> October, 2018 communicating that it had declined the Applicant's application for renewal of tax exemption as the medical committee was of the view that the nature of disability affecting the Applicant did not meet the threshold for tax exemption. Further that it would not recommend him to the Kenya Revenue Authority for tax exemption on account of my disability.
13. The Ex parte Applicant also contends that the Respondent's administrative action being of a nature likely to affect his rights/ fundamental freedoms was procedurally unfair as the Respondent failed to provide him with an opportunity to be heard neither was he provided with prior and adequate notice of the nature and reasons for the proposed administrative action.
14. There is no response on record despite there being evidence of service as seen in the Affidavit of Service sworn by Beth Kithome on 14<sup>th</sup> October, 2022.
15. The Ex parte Applicant filed written submissions dated 7<sup>th</sup> October, 2022 in which the case of Municipal Council of Mombasa vs. Republic, Umoja Consultants Ltd Nairobi Civil Appeal No. 185



of 2007(2002)eKLR is cited on the purpose of judicial review and the case of Pastoli vs. Kabale District Local Government Canal & Others (2008) 2EA 300 on the circumstances under which orders of Judicial Review can be issued.

16. The Applicant submits that the decision by the Applicant was tainted with illegality, irrationality and procedural impropriety as despite the report by Mbagathi Hospital dated 29<sup>th</sup> May, 2018 indicating that the Applicant had permanent disability and also recommending him to be registered as a person living with disability and that he is eligible for renewal as a person with disability the Respondent still directed the Applicant to undergo further vetting at Mama Lucy Kibaki hospital on 21<sup>st</sup> September, 2018. where a superficial physical examination was conducted and this was within a period of four (4) months since the time he was examined at Mbagathi National Hospital on 29<sup>th</sup> May, 2018. The report from Mama Lucy hospital is said to be what informed the Respondent's decision dated 5<sup>th</sup> October, 2018.
17. It is also the Applicant's submission that his right to Fair Administrative Action according to Article 47 of *the Constitution* was infringed being that the decision by the Respondent did not give reasons that informed its decision. Further that he was not supplied with the unanimous report by the vetting committee as had often been done.
18. The Applicant also submits that the Respondent has not supplied him or the Court with any documents that contradict the report made at Mbagathi Hospital therefore as it stands the decision by the Respondent is illegal and should be quashed by this court.
19. The Applicant also submits that he is employed by the Directorate of criminal investigation as an officer and as such this has limited his ability to move around to perform duties that are assigned to him and he therefore cannot perform his duties as before and as such there was gross unreasonableness in the decision taken and that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision.
20. The Applicant also submits that having been registered as a person with disability and having been issued with a Tax Exemption certificate, a legitimate expectation arose that the benefit conferred will be maintained in the absence of any change in the Applicant's disability condition.
21. Further that the expectation the Applicant sought to protect was legitimate, and sufficiently protected by law and that by disregarding the recommendation from the Medical Assessment report from Mbagathi Hospital, the Respondent violated the principle of legitimate expectation.
22. Section 10 of the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010 is said to outline two instances under which a Tax Exemption certificate can be revoked, namely, when the status of the Applicant has significantly changed in a manner that affects his or her eligibility status for the tax exemption, and, where the Applicant omitted material information at the time of making the application that if such information was submitted it could have affected his or her eligibility for tax exemption.
23. It is the Applicant's case that none of the two instances have been proven by the Respondent herein. Also, that according to Legal Notice no 36 of 26<sup>th</sup> March, 2010, section 7 provides that an Applicant may appeal to the Minister through the council against the decision of the Commissioner. However, the Applicant could not appeal the decision of the Commissioner as there was no recommendation in the first instance.
24. The Applicant also submits that he did Appeal through letters dated 3<sup>rd</sup> April, 2019, 25<sup>th</sup> April 2019 and 17<sup>th</sup> October, 2018 respectively, but to date there has been no response. The Applicant contends that he has even visited the Respondent's offices to follow up on the appeal but the Respondent has



totally failed and/or refused to grant the Applicant fair hearing, as such the decision, the action and/or omission by the Respondent was irrational, biased and unjustified.

25. The case of *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others*, [1997] eKLR is referred to on the Order of Mandamus. The Applicant submits that there is no other legal remedy that is available to remedy the infringement of his legal right and that the duty has become due and it has been established that such duty is shown to exist.
26. The Applicant submits that the duty of the Respondent in connection to the subject matter is established under Section 42 of the *Persons with Disabilities Act*. The provision is said to mandate the Respondent upon application by the Applicant to recommend the Applicant to be exempted from remitting income tax and any other levies on such income according to Section 35 of the Act.
27. The duty it is submitted became due when the medical assessment from Mbagathi Hospital confirmed that the Applicant is eligible for renewal as a person with disability. The Respondent is said to be under a duty to produce before this court the Medical Assessment report from Mama Lucy Kibaki Hospital which gave a contrary opinion and which informed its decision, but the same is yet to be produced.
28. The Respondent it is submitted had a duty to this court for the interest of justice to produce any further information to aid the court so as to understand its grounds which informed the decision to deny the Applicant's application for tax exemption.
29. In conclusion the Applicant submits that the decision made thereto by the Respondent was unreasonable, irrational and improper and that the court ought to quash the impugned decision dated 5<sup>th</sup> October, 2018. Also, that the Respondent should be compelled to forthwith recommend the Applicant to the Kenya Revenue Authority for renewal of his tax exemption certificate.
30. There are no submissions on record for the Respondent.

### **Analysis and Determination**

31. I have considered the Application filed before this court and the affidavit in support and also the Ex parte Applicant's written submissions and I find that the only issue that arises for determination herein is whether the Ex parte Applicant has adduced enough grounds for the grant of the order of certiorari and mandamus.
32. The scope of judicial review was clearly elucidated in the case of *Pastoli v Kabale District Local Government Council and Others* [2008]2 EA 300 where the Court held as follows;

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-



observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

33. The scope of a judicial review court is limited to instances where the procedure applied in reaching the impugned decision was tainted with illegality, irrationality and procedural impropriety. It is trite that a judicial review court ought not to interfere with the independence of a statutory body mandated to undertake a particular function unless the said decision was reached illegally, irrationally or without observance of the rules of natural justice.
34. My understanding of the Applicant’s case is that he is challenging the Respondent’s decision to decline to issue him with a tax exemption on grounds of disability. The Ex parte Applicant contends that he was not given a reason for the said decision nor was he given an opportunity to be heard before the decision was made. He also contends that the medical report from Mama Lucy Hospital which informed the Respondent’s decision to decline to grant a tax exemption was never made available to him nor was the medical committees report.
35. It is not lost to the Court that as is seen from the record the last time the Respondent was before the Court was on 30<sup>th</sup> June,2022 when M/s Chimau was holding brief for M/s Chilaka. I also note that as evidenced by the Affidavits of Service sworn on diverse dates between 18<sup>th</sup> January,2023,19<sup>th</sup> January,2023,20<sup>th</sup> July,2022, 28<sup>th</sup> May,2022 and 18<sup>th</sup> February,2022 that the Ex parte Applicant has always served the Respondent with notices and pleadings in regard to the matter before this Court and therefore the Respondent cannot claim to not be aware of the proceedings herein.
36. The Court has had a chance to review the evidence adduced by the Ex parte Applicant and it notes that indeed the Respondent through an email dated 5<sup>th</sup> October,2018 communicated to the Ex parte Applicant that he was no longer eligible for a tax exemption as in their view the nature of disability did not meet the threshold for tax exemption. The Respondent also advises the Ex parte Applicant to prefer an appeal to the Cabinet Secretary, National Treasury through the Executive Director, NCPWD if he was aggrieved by the said decision.
37. I also note that the Ex parte Applicant aggrieved by the said decision wrote severally to the Cabinet Secretary, National Treasury through the Executive Director, NCPWD in seeking to Appeal against the said decision however there is no evidence on record that any of the said letters were ever responded to or that the Ex parte Applicant appeal was ever heard and determined. The letters are dated 17<sup>th</sup> October,2018,3<sup>rd</sup> April,2019 and 25<sup>th</sup> April,2019.
38. The Court of Appeal in *Republic vs. Kenya National Examinations Council ex parte Gathenji & Others*, (1997) eKLR aptly discussed the judicial review orders of certiorari and mandamus as follows;

“The next issue we must deal with is this: What is the scope and efficacy of an order of mandamus? Once again we turn to Halsbury’s Law of England, 4<sup>TH</sup> Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:- “The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although



there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.” At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. 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.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. We can do no better than give examples.

To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.”

39. The Applicant has contended that the Applicant failed to accord him fair administrative justice before reaching its decision to renew his tax exemption. The Court notes that no evidence has been adduced challenging this submission and it is evident from the mode of communication by the Respondent that Applicant had not been given an opportunity to adduce his case on why a renewal should be allowed. There is also no attachment of the medical report from Mama Lucy Hospital nor is there a resolution by the Committee on the said decision yet according to the Applicant this was not the practice previously.
40. The Respondent’s duty in connection to the issue of tax exemption is provided for under Section 42 of the *Persons with Disabilities Act* which states 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 education 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.

41. The Constitution under Article 47 provides as follows;

“Fair administrative action.

47.

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is <sup>31</sup> Constitution of Kenya, 2010 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.”

42. The Fair Administrative Action Act, 2015 under section 4 provides thus;

“4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;



- (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to–
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”

43. This Court is not convinced that the Ex parte Applicant was accorded fair administrative action and for this reason the impugned decision is hereby set aside.

### **Order**

44. The Ex parte Applicant’s application dated 20<sup>th</sup> July,2022 is hereby allowed in the following terms;
- i. That an order of certiorari is hereby issued quashing the decision of the Respondent communicated through an email dated on 5<sup>th</sup> October,2018 declaring the Applicant’s application for renewal of tax exception unsuccessful.
  - ii. That an order of mandamus is hereby issued compelling the Respondent to recommend the Applicant to the Kenya Revenue Authority for renewal of tax exemption running five (5) years from today’s date.
  - iii. That order ii shall be complied with within 30 days of todays date.
  - iv. That the costs of this Application be in the cause.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY 2023**

**J. CHIGITI (SC)**

**JUDGE**

