



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E003 OF 2021

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

BETWEEN

JUSTUS MUSYOKI KIMOLO.....APPLICANT

VERSUS

NATIONAL COUNCIL FOR PERSONS

WITH DISABILITIES.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

RULING

1. Justus Musyoki Kimolo, the Applicant herein, has moved this Court in an application brought by way of Chamber Summons dated 21st December 2021, in which he is seeking the following orders against the Respondents herein:

1. **THAT the Application to be certified as urgent and be heard in the first instance ex parte.**
2. **LEAVE for an Order of Mandamus compelling the 1st Respondent, National Council for Persons with Disabilities to issue a recommendation letter in the name of the Applicant herein, to the Commissioner of Income Tax, the 2nd Respondent, for processing and exemption.**
3. **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 Applicant's application for tax exemption unsuccessful.**
4. **LEAVE be granted to the Applicant to apply for an order of Mandamus compelling the 2nd Respondent to issue the Applicant with a tax exemption certificate.**
5. **LEAVE for a Declaration that the National Council for Persons with Disabilities is in breach of its duty under section 35(2) and 42 of the Persons with Disability Act No. 14 of 2003.**
6. **A declaration that the National Council for Persons with Disabilities is in breach of its duty under section 35(2) of the Persons with Disability Act; No. 14 of 2003.**
7. **Further or in the alternative damages arising from the matters herein and interest thereon.**
8. **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**
9. **The Applicant hereby requests a hearing of this application before the Judge pursuant to Rule 3 of Order 53 of the Civil Procedure Act.**
10. **If leave to apply is granted, a direction that the hearing of the application for judicial review be expedited.**

11. THAT costs of this Application be provided for.

2. The said application is supported a statutory statement dated 21st December 2020 and a verifying affidavit sworn on the same date by the Applicant. The grounds for the application are that the Applicant was registered as a person with disability by the 1st Respondent under Registration number NCPWD/P/440535 on 12/04/2018, and subsequently, made an application to be exempted from income tax obligations and presented all the necessary documents as prescribed by the 1st Respondent.

3. The Applicant was however severally informed after medical examinations, and including upon appeal, that he had not met the required threshold and thus would not be recommended for Income tax exemption. In addition, that on the 19th February 2020 the Applicant wrote to the 1st Respondent through his advocate demanding for an explanation as to why he's application was declined and further sought clarification on what constitutes the threshold for qualification but the letter went unanswered. It is therefore the Applicant's case that the 1st Respondent's administrative action of declining his application for income tax exemption is unlawful, unreasonable and procedurally unfair

4. The Applicant annexed copies of his medical reports, disability card, the exemption guidelines published by the 1st Respondent, and correspondence exchanged with the 1st Respondent on his exemption.

The Determination

5. 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 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.

6. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

7. In the present application, the Applicant has provided evidence of his disability registration and correspondence on, and the 1st Respondent's decision his application for income tax exemption. He has also averred as to why he considers the said decision to be illegal. To this extent I find that the Applicant has met the threshold of an arguable case, and is therefore entitled to the leave sought to commence judicial review proceedings against the Respondent.

8. On the question of whether the said leave can operate as a stay of the impugned report, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

9. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the Courts in this regard were laid down in the said decision, and in various decisions by Kenyan Courts.

10. It has in this regard been held that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation. See in this regard the decisions in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006, Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995. Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR and James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR.**

11. In the present application the 1st Respondent's decision declining to recommend the Applicant for income tax exemption does not require any further steps to be taken in its implementation, and the said decision is therefore not amenable for stay.

The Disposition

12. In the premises I hereby direct as follows:

i. The Applicant's Chamber Summons dated 21st December 2020 is hereby admitted to hearing on an *ex parte* basis in the first instance.

ii. 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 recommendation letter in the name of the Applicant herein, to the Commissioner of

Income Tax, the 2nd Respondent, for processing and exemption.

iii. The *ex parte* 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 Applicant's application for tax exemption unsuccessful.

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

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

vi. The *ex parte* Applicant is granted leave to apply for damages arising from the matters herein and interest thereon.

vii. The prayer that the leave so granted herein 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 is declined.

viii. The costs of the Chamber Summons dated 21st December 2020 shall be in the cause.

ix. The Applicant shall file and serve the Respondents with (i) the substantive Notice of Motion and submissions thereon, (ii) the Chamber Summons dated 21st December 2021 and its supporting documents, (iii) a copy of this ruling, and (v) a hearing notice, within twenty-one (21) days from today's date.

x. Upon being served with the said pleadings and documents, the Respondents shall be required to file their responses to the substantive Notice of Motion and reply submissions within twenty-one (21) days from the date of service.

xi. The hearing of the substantive Notice of Motion shall be held on 22nd April 2021.

xii. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicant's substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

xiii. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

xiv. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

xv. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

xvi. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for hearing on 22nd April 2021.

xvii. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicant by electronic mail by close of business on Thursday, 12th February 2021.

xviii. Parties shall be at liberty to apply.

13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2021

P. NYAMWEYA

JUDGE