



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW APPLICATION NO. 5 OF 2019

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE DECISION OF THE NATIONAL COUNCIL FOR PERSONS WITH DISABILITY

AND

IN THE MATTER OF PERSONS WITH DISABILITY ACT

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTR OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

NATIONAL COUNCIL FOR PERSONS WITH DISABILITY.....RESPONDENT

BNB.....EX PARTE APPLICANT

JUDGMENT

[1] The Notice of Motion dated **14 June 2019** was filed herein by the *ex parte* Applicant, **BNB** (hereinafter the Applicant), pursuant to **Sections 8 and 9** of the **Law Reform Act, Chapter 22** of the **Laws of Kenya**; and **Order 53** of the **Civil Procedure Rules** for the following reliefs:

[a] An order of Mandamus directing the Respondent to issue a Certificate of Disability in respect of the Applicant to the Kenya Revenue Authority;

[b] An order of Certiorari to bring before this Court for purposes of being quashed the decision of the Respondent made on **14 January 2019**;

[c] An order that costs of the application be borne by the Respondent.

[2] The application was premised on the grounds that the Applicant was certified to be a person with disability and was issued with a

renewable certificate of tax exemption on **4 October 2013**; and that when the said certificate expired on **1 September 2018**, the Respondent declined to renew the same and instead directed the Applicant to undergo an operation and submit himself for further medical examination after a period of one year. It was therefore the contention of the Applicant that the Respondent's decision was not only arbitrary but was also discriminative; and therefore amounts to a violation of his rights to tax exemption; and to the benefit of the provision for retirement at the age of 65 years.

[3] In the Affidavit Verifying the Facts, sworn by the Applicant on **14 June 2019**, he deposed that he got involved in a near fatal accident on **24 November 2007** in which he suffered severe injuries that resulted in substantial permanent disability. He was accordingly registered with the National Council for Persons with Disability and was therefore entitled to tax exemption, among other benefits. To that end, he was issued with Income Tax Exemption Certificate dated **4 October 2013**, a copy of which was annexed to his affidavit as **Annexure BNB3**. The Applicant further averred that the said Certificate, which was valid for a renewable period of 5 years, expired on **1 September 2018**.

[4] It was further the averment of the Applicant that, well before the expiry of his Tax Exemption Certificate, he submitted himself for medical examination at the instance of the Respondent as was the norm, in pursuit of his application for renewal of the Certificate; but that upon receipt of the medical reports, the Respondent failed, neglected and/or refused to issue a Certificate of Disability or recommend him to the **Kenya Revenue Authority** or the **Ministry of Finance and Planning** as a person with disability for purposes of tax exemption and other related benefits. Instead, the Respondent instructed him to reapply after one year upon undergoing an operation and further medical examination.

[5] It was therefore the contention of the Applicant that the Respondent's decision was not only arbitrary and capricious, but also amounted to a violation of his constitutional rights. It was further his contention that the decision is *ultra vires* the mandate of the Respondent, and therefore ought to be quashed. He annexed several supporting documents to his affidavit, including an identity card issued to him by the Respondent, identifying him as a person with disability (**Annexure BNB7**). The Applicant prayed, therefore, that his application be allowed and the orders sought granted.

[6] The court record shows that, although the application was duly served on the Respondent on **21 June 2019**, no steps were taken by the Respondent to defend or resist it. The fact of service is manifest in the Affidavit of Service sworn by **Joyce Nelima Pepela** on **24 June 2019**. There are two other Affidavits of Service of a similar kind that were filed herein to demonstrate that the Respondent was duly notified of the mentions scheduled for **17 September 2019** and **22 January 2020**, but opted not to attend court. In the premises, the application is unopposed.

[7] In the written submissions filed herein by **Mr. Momanyi**, learned counsel for the Applicant, he reiterated the Applicant's averments in his Supporting Affidavit and Statement and impugned the decision of the Respondent on the grounds that it is *ultra vires* and arbitrary; and that it did not amount to fair administrative action. Counsel submitted that the mandate of the Respondent is to subject applicants to medical examination and to thereafter act on the recommendations made to it; and not to compel applicants to undergo operations. It was on that basis that he urged the Court to find that the decision of the Respondent dated **14 January 2019** is *ultra vires*. Counsel also submitted that the decision is arbitrary and capricious in so far as it was not based on the result of the medical examination.

[8] As has been pointed out herein above, the application is unopposed; and therefore, the question for my determination is whether the Applicant has made a good case to warrant the issuance of the Judicial Review Orders prayed for in the Notice of Motion dated **14 June 2019**. In resolving this issue, I find instructive the expressions of **Diplock, LJ** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D**. Here is what the learned Judge had to say:

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

[9] Thus, in **Halsbury's Laws of England, 4th Edition, Volume 1** the scope of the remedy of mandamus is aptly explicated thus:

"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..."

[10] Certiorari on the other hand, is defined in **Black's Law Dictionary**, Tenth Edition, as an extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record of its case for review. Likewise, in the **Handbook of Common Law Pleading** by **Benjamin J. Shipman** it is opined thus:

“The established method by which the Court of King's Bench from the earliest times exercised superintendence over the due observance of their limitations by inferior courts, checked the usurpation of jurisdiction, and maintained the supremacy of the royal courts, was by writs of prohibition and certiorari. A proceeding by writ of certiorari (cause to be certified) is a special proceeding by which a superior court requires some inferior tribunal, board, or judicial officer to

transmit the record of its proceedings for review, for excess of jurisdiction. It is similar to a writ of error, in that it is a proceeding in a higher court to superintend and review judicial acts, but it only lies in cases not appealable by writ of error or otherwise.”

[11] With the foregoing in mind, I have given careful consideration to the application, the averments in the Statement of Facts and the Supporting Affidavit, as well as the documents annexed to the Supporting Affidavit. It is manifest therefrom that indeed the Applicant got involved in a road traffic accident on **24 November 2007** wherein he sustained fairly serious injuries as set out in the Medical Report prepared by **Dr. Gaya** dated **25 April 2012**. The report was annexed to the Applicant’s affidavit as **Annexure BNB 2** and it shows that, as a result of the accident the Applicant now walks with a limping gait on the left leg which was shortened by 3 cm. Overall, the degree of permanent disability was assessed at 65% by **Dr. Gaya**.

[12] There is also clear and uncontroverted evidence to show that, on **21 June 2013**, the Applicant was examined by a panel of doctors at **Uasin Gishu Hospital** for the purpose of reporting on his disability assessment and his limping gait was confirmed. Accordingly, the Applicant was duly registered as a person with disability and issued with an identification card for that purpose. As such, he applied for and was accorded the reliefs and incentives due to such citizens; notably, income tax exemption, by dint of **Section 35** of the **Persons with Disabilities Act, 2003**. The Applicant produced as an exhibit a copy of his Income Tax Exemption Certificate dated **4 October 2013** in proof of his assertions.

[13] The Income Tax Exemption Certificate aforementioned is explicit that it was valid for a period of five years from **1 September 2013**; and that it would expire on **1 September 2018**. It is indeed the requirement of **Regulation 8(1)** of the **Persons with Disabilities (Registration) Regulations, 2009** that:

“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.”

[14] It was in the light of the foregoing that the Applicant applied to the Respondent for renewal of his registration and presented himself for a medical examination at **Uasin Gishu Hospital** on **4 June 2018**, with a view of having his Tax Exemption Certificate extended, as the same was due to lapse on **1 September 2018**. The Applicant also availed evidence to demonstrate that he also availed himself at **Kenyatta National Hospital** on **Wednesday 14 November 2018** for further medical examination. The report marked **Annexure BNB 5** shows that he still had a left sided limp and was using a walking aid. Although the Applicant averred that the second examination was at the instance of the Respondent, no particular correspondence was availed to prove that assertion. I note too that the second medical report appears incomplete in so far as it does not include the opinion or prognosis of the examining doctor/panel of doctors.

[15] Be that as it may, the Applicant availed uncontroverted evidence herein to the effect that the pertinent medical reports were submitted to the Respondent; and that upon consideration thereof it took a decision that the Applicant’s application for tax exemption be reviewed in a year’s time after he had undergone hip replacement surgery. The decision was conveyed vide the Respondent’s letter dated **14 January 2019** marked **Annexure BNB 6** to the Supporting Affidavit. For its full tenor and effect, the pertinent aspects of letter aforesaid are replicated here below:

“...The Council writes in reference to your application for tax exemption and the decision of vetting panel that vetted you on the 13th December, 2018.

The panel recommended that you be reviewed after one year and once you have undergone the hip replacement.

The council also notifies you that you are at liberty to appeal the panel decision...”

[16] In paragraph 7 of his affidavit, the Applicant acknowledged that for renewal purposes, he was required to undergo the same process of medical examination to ascertain his current state of disability before he could be issued with a new Income Tax Exemption Certificate. He likewise acknowledged that he submitted himself to the process, and was examined not only at **Uasin Gishu Hospital**, but also at **Kenyatta National Hospital**. He relied on the two reports to demonstrate compliance and eligibility. Hence, the arguments by **Mr. Momanyi** that, in requiring the Applicant to be examined at **Kenyatta National Hospital**, the Applicant was subject to unfair administrative action clearly has not traction. The reason for this conclusion is manifest in **Regulation 7** of the **Persons with Disabilities (Registration) Regulations**, which mandates the Respondent to make such inquiries as are necessary before issuing a registration certificate.

[17] Secondly, there is nothing in the letter dated **14 January 2019** to indicate that the Respondent made it a condition that the Applicant undergoes hip replacement surgery. Granted that the concluding part of the **Kenyatta National Hospital** report is missing, there is no ruling out whether the recommendation emanated from the said hospital; granted the use of the definite article “the” before the words “hip replacement” in the impugned letter.

[18] Thirdly, the letter does show that the Applicant was given an opportunity to appear before the Respondent’s vetting panel before the impugned decision was made. In the circumstances, it cannot be said that he was not accorded a fair hearing. Indeed, one thing that particularly stands out in the impugned decision is the fact that no final decision was taken on whether or not to renew the Applicant’s registration for another period of five years. That being the case, recourse ought to have been had to the provisions of **Regulation 8(2)** of the **Persons with Disabilities (Registration) Regulations, 2009**, which provides that:

“If an application for renewal is made before the expiration of the period of validity of the certificate of registration the certificate shall remain in force until the application is approved...”

[19] The Applicant's application for renewal of his registration and for the issuance of a new Income Tax Exemption Certificate having been made before the expiry of the five-year period, it follows that he was entitled to the protection afforded by **Regulation 8(2)** aforementioned pending a final decision on his application by the Respondent. Thus, whereas I find no basis for issuing an order of Certiorari in the circumstances, I am satisfied that good cause has been shown for the issuance of an order of Mandamus to compel the issuance of an Income Tax Exemption Certificate to the Applicant.

[20] In the result, the orders that commend themselves to me, and which I hereby issue, are as hereunder:

[a] That an order of Mandamus be and is hereby granted directing the Respondent to issue a Certificate of Disability in respect of the Applicant for purposes of tax exemption.

[b] That costs of the application be borne by the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY, 2020

OLGA SEWE

JUDGE