



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPL. CASE NUMBER 355 OF 2012

GEORGE M. NDIRANGU.....PLAINTIFF/APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1<sup>ST</sup> DEFENDANT

DIRECTOR OF PENSIONS.....2<sup>ND</sup> DEFENDANT

RULING

1. The Applicant **George M. Ndirangu** is a disabled person as certified by the **National Council for Persons with Disabilities** vide its letter dated the 13<sup>th</sup> March 2007.

Up to May 2007 he was an employee of **Housing Finance Company Limited**. His terminal dues and pension were to be subjected to the **Income Tax** deductions. Under the **Pensions with Disabilities Act 2003**, persons with disabilities are exempted from the **Provisions of Section 12(3)** that reads:

*“An employee with disability shall be entitled to exemption from tax on all income accruing from his employment.”*

Before his dues were paid, the applicant had sought exemption from the Ministry of Finance who vide its letters of 5<sup>th</sup> March 2007 and 3<sup>rd</sup> April 2007 informed him that the modalities for operationalizing the provisions of the Persons with Disability Act on Tax exemption on employment income had not yet been finalised.

His employer Housing Finance therefore computed the terminal dues and pension taking into account the tax element.

2. By his Notice of Motion dated 7<sup>th</sup> September 2012 and filed on the 7<sup>th</sup> September 2012, brought under the provisions of **Order 51 Rule 1 and Order 33 Rules 1, 2 and 3 of the Civil Procedure Rules**, he sought the following orders:

1-----

2 This Honourable court be pleased to declare the plaintiff/applicant a pauper and grant the plaintiff/applicant leave to institute the intended suit as a pauper.

The application was premised on the grounds that the applicant is disabled, is unemployed and has no

means of income, and he is exempted from paying court fees by the **Disability Act 2003**.

In his supporting affidavit sworn on 7<sup>th</sup> September 2012 he reiterated the above grounds and added that his former employer, Housing Finance deducted a sum of Kshs.1,161,902/50 and forwarded it to Kenya Revenue Authority despite his protests that he was exempted from tax in view of the provisions of the **Persons with Disabilities Act 2003**.

3. He sought leave of court to be allowed to file a suit against the **Kenya Revenue Authority and the Director of Pensions** to challenge the deductions of Kshs.1,161,902/50 from his terminal dues.

The application is opposed by both intended defendants.

The Kenya Revenue Authority filed its grounds of opposition on the 23<sup>rd</sup> July 2014 stating that the applicant has no cause of action against it, that the application was instituted with undue delay and has no merit. It further raised preliminary objection filed on the 28<sup>th</sup> July 2014 that:

1. The application is fatally defective as the provisions of **Sections 35 and 36 of the persons with disability Act** had not come into force by the time the deductions were made.
2. That the application has not complied with **Order 33 of the Civil Procedure Rules 2010**.
3. That the prescribed procedure for bring up an application for exemption had not yet been formulated and/or prescribed to warrant exemptions.
4. The Director of Pensions did not file any responses to the application but during the hearing of the application, the said second defendant indicated that it would adopt the first Defendants submissions which it filed on the 18<sup>th</sup> February 2015.

In his submissions, the applicant through his advocate submitted that he had produced enough documents to proof that he is a disabled person, and that such documents were not challenged by the Respondents. He urged the court to consider **Article 159(d) of the Constitution**; and allow the applicant a chance to litigate his case without paying court fees.

The first Respondents submissions are that as at the time the applicants employment was terminated, **Section 35 and 36** of the **Persons with Disability Act 2003** had not come into effect, an that its provisions cannot be applied retrospectively.

The court has considered the relevant provisions of the **Persons with Disabilities Act Chapter 23 Laws of Kenya**.

**Section 35(1) states:**

*“All persons with disabilities who are in receipt of an income may apply to the Minister responsible for Finance for exemption from income tax and any other levies on such income.”*

5. The preamble to the Act states that the persons with **Disabilities Act, 2003** shall come into operation on such dates as the minister may by Notice in the Gazette appoint and different dates may be appointed for different provisions.

**Legal Notice No. 64 – No 14 of 2003** brought into force the **Persons with Disabilities Act other than Sections 22, 23, 24, 35,(1) 35,(2) 39 and 40**.

My understanding of the above Legal Notice is that all the provisions of the **Persons with Disabilities Act, 2003**, came into force on the 16<sup>th</sup> June 2004 except provisions under **Sections 22, 23, 24, 35(1) 35(2), 39 and 40**.

This application is in respect of **Sections 35(1) and 35(2) of the said Act** which came into force vide **Legal Notice No. 182 of 2009** on the **1<sup>st</sup> January 2010**.

There is therefore no ambiguity on the rationality of the relevant provisions.

6. **Legal Notice No 36 of 2010** (Income Tax Deductions and Exemptions) **Order, 2010** rules prescribed the procedure to be followed in an application for exemption. The above procedure was not in force as at the time the applicants dues were deducted and when he sought exemption from income tax from his employment dues.

7. I have considered the application under consideration. The applicant seeks an order to be declared a pauper and to be granted leave to bring the suit as such.

**Order 33 of the Civil Procedure Rules 2010** governs the procedure to be adopted in such applications:

**33(1)(2)** the applicant must show that he is not possessed of sufficient means to enable him pay court fees for institution of the suit.

**33(2)** the application shall contain particulars required in regard to pleadings together with a statement that the pauper is unable to pay the fees prescribed and shall be signed in the manner prescribed for signing pleadings.

**33(3)** the application shall be presented to the court by the applicant in person unless he is exempted from appearance in court by **Section 82 of the Act**.

**33(4)** Where application is proper and presented to court the court may examine the applicant or his agent regardless of the merits of the claim and the property of the applicant.

**33(5)** the court shall reject an application for permission to sue as pauper.

(a) where it is not framed and presented in the manner prescribed in **Rule 2 and 3**.

(b) where the applicant is not a pauper

(c) where he has within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper.

(d) where his allegations do not show a cause of action or --

8. I have scrutinised the application dated 7<sup>th</sup> December 2012. It is supported by a supporting affidavit by the applicant, and drawn by the firm of **Kimatta & Co Advocates**.

Three issues for determination present themselves as:

(1) whether the applicant has a cause of action against the intended defendants.

(2) whether the applicant is a pauper

(3) whether the correct procedure has been followed in bringing the application before the court.

The subject of the applicants claim is based on the provisions of **Section 35 (1) and 35(2) of the Persons With Disability Act 2003** – which came into force on the 1<sup>st</sup> January 2010. Can these provisions be applied retrospectively so as to cover the applicants claim?

I have stated above that the preamble to the Act stated clearly that different Sections of the Act were to become operational on different dates as the Minister may appoint. My reading of the above is that the intention of drafters was that no retrospective effect was to be applied to any of the provisions as each was to be operational as and when the Minister would appoint.

The issue of Retrospective application of legislation was discussed in detail in the recent cases touching on Judges' Retirement age in **Constitutional and Human Rights petition Nos. 386 of 2015, 495 of 2014 and 244 of 2014** where a bench of five Learned Judges laid down the parameters to discern applicability of Retrospective/Retroactive legislation *vis-av-vis* statutory **Legislation and the Constitution 2010**.

This court finds that the provisions of **Section 35(1) of the Act under** consideration cannot be applied retrospectively, meaning, the applicant's cause of action against the defendants having taken place before coming into force of the said section is bad in law. There is therefore of cause of action against the intended defendants.

9. As to whether the applicant is a pauper to take advantage of the provisions of **Order 33 of Civil Procedure Rules**, I note that no material has been placed before the court to demonstrate such allegations. Mere statements without supporting evidence cannot be used to determine such status. The application as presented does not comply with the procedural requirements under **Order 33 of Civil Procedure Rules 2010**. Nothing was placed before the court to show that the applicant lacked sufficient means to pay court fees despite the disability. The court appreciates that the applicant is disabled. It is also acknowledged that disability is not inability. Indeed the applicant was working with the disability for his former employer for twenty-seven years. It is the courts finding that the applicant is not a pauper to take advantage of the provisions of **Order 33 Civil Procedure Rules 2010**, having been working for twenty-seven years and paid his terminal dues less the taxed amount of Kshs.1,161,902/50 in May 2007.

I agree with the courts finding in **Stephen Muya Giita -vs- Margaret Kahumbu Mwahu & Another ELC Misc Application No. 5 of 2012 – (2013) KLR** that permission to sue as a pauper is subject to the terms of **Order 33 Rule 5** which allows a court to reject such application where no cause of action is shown.

Such holding was followed in **Harraiah -vs- Coast Professional Freighters Ltd HCCC NO. 63 of 2002 (Mombasa)**.

10. The third issue to consider is whether the correct procedure was followed in bringing the application to court. **Section 35(5) (a)** the court shall reject an application for permission to sue as a pauper if it not framed and presented. It does not comply with the prescribed procedure which is mandatory. It ought to be presented in person unless he is exempted from appearance in court by **Section 82 of the Act**. It ought to be signed by the applicant. He has not shown the court that he is unable to sign the application personally or to appear in person to qualify to be represented by an agent. The applicant's advocate Mr. Kimatta has urged the court to allow the application by virtue of **Article 159 of the Constitution** that justice is to be administered without undue regard to procedural technicalities.

11. The applicant had advantage of legal aid by his advocate. **Section 33 (2) and (3)** is coached in mandatory terms, that if the prescribed procedure is not followed it ought not be allowed. **Article 159 of the Constitution** was not made to rubbish all other statutory procedural requirements, but could only come to aid when it is clear that the procedural technicality it seeks to cure would be for the wider interest of justice.

In its totality, the court finds that the application lacks merit and is therefore dismissed with no orders as to costs..

**Dated, signed and delivered in open court this 4<sup>th</sup> day of February 2016**

**JANET MULWA**

**JUDGE**