



**Fwamba v Moi Teaching and Referral Hospital; National Council for
Persons with Disabilities (Interested Party) (Petition E003 of 2023)
[2024] KEELRC 2596 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2596 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E003 OF 2023
MA ONYANGO, J
OCTOBER 25, 2024**

**IN THE MATTER OF ARTICLES 22,38,54,81,87,90,176,
177(1)(C) AND 197 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION 34
AND 35 OF THE ELECTIONS(GENERAL) REGULATIONS, 2022**

BETWEEN

MARGARET NALIAKA FWAMBA PETITIONER

AND

MOI TEACHING AND REFERRAL HOSPITAL RESPONDENT

AND

**NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES INTERESTED
PARTY**

RULING

1. By her application dated 7th February, 2024, the Petitioner seeks orders that this court be pleased to review and or vary its judgment dated and delivered on 24th November 2023 and the orders made therein. She also prays that costs of this application be provided for.
2. The grounds upon which the application is anchored as contained at the foot of the application are that the court, by a Judgment delivered on 24th November, 2023 dismissed the Applicant's Petition on account that there was no evidence of tax exemption certificate to support the Applicant's petition and the extension of the retirement age for persons living with disabilities, among other reasons; that the Tax Exemption Certificate was inadvertently left out of the proceedings by Counsel



representing the Petitioner who instead filed the Application for Tax Exemption; that though the said Tax Exemption Certificate did not accompany the Petition as a supporting document, the said Tax Exemption Certificate was mentioned by the Petitioner as a document that she sought to rely on, and the same was on record having been filed by the Respondents in their Reply to the Petition; that the Tax Exemption Certificate was on record as the Respondent had in its paragraph 12 of the Replying Affidavit attached the Tax Exemption Certificate; that the Honourable Court did not consider the Tax Exemption Certificate which was crucial evidence that was inadvertently left out of the accompanying documents in the Petition by the Counsel on record for the Petitioner, which evidence if considered, could have made the Court rule otherwise; that the Applicant should not suffer as a result of mistake by her Counsel who mistakenly failed to file the Tax Exemption Certificate; that there is need for this Honourable Court to intervene and review its decision in light of the evidence and in light of the fact that the Tax Exemption Certificate was filed by the Respondents and therefore it was not an issue in dispute; that no prejudice will be suffered by the Respondent if the orders sought are granted.

3. In the supporting affidavit sworn by counsel for the Petitioner, he reiterates that the Respondent filed the Tax Exemption Certificate at paragraph 12 of the Replying Affidavit sworn on 14th August 2023 by Paul Mulwo and that there is need for this court to intervene and review its decision in light of the evidence. That in view of the fact that the Tax Exemption Certificate was filed by the Respondent, it was not an issue in dispute.
4. The Respondent filed a Replying Affidavit of Ewang Tsisiga Ebude, the Principal Legal Officer of the Respondent sworn on 26th March, 2024. The affiant deposes that section 80 of the Applicant had failed to demonstrate the discovery of new evidence or apparent error on the face of the record. Further, that the applicant has not explained the unreasonable delay in filing the application or inadvertence on the part of the Applicant's counsel.
5. The affiant further deposes that the Disability Card of the Applicant was issued in to the Petitioner on 17th December 2019 while the PSC Regulations commenced operations on 20th January, 2020 and the Petitioner's retirement date was 2nd July, 2023. That in this regard the Petitioner had had ample time of approximately 5 months to comply with the PSC Regulations.
6. It is further the averment of the Affiant that should the court be inclined to review the Judgment the Petitioner would still not be compliant with Regulation 70(2) of the PSC Regulations.
7. The Affiant prays that the application be dismissed as it does not meet the requirements of Order 45 Rule 1 of the Civil Procedure Rules which provides for review.
8. The Application was disposed of by way of written submissions. Both parties filed their submissions.
9. The Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 pronounced itself as follows with regard to the scope of review:

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It



may be pointed out that the expression “any other sufficient reason means a reason sufficiently analogous to those specified in the rule”

10. Here at home in Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR, the Court held

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

11. I have examined the exhibit marked “MNF-1 a and b” attached to the Petitioner’s supporting affidavit filed in court with the application dated 29th June 2023. I have also looked annexure marked “PL1 (a) and PL1 (b)” in the Respondent’s Replying Affidavit filed in court on 11th July 2023 in opposition of the Petition. The Petitioner filed copies of the disability card and application for tax exemption while the Respondent filed copies of the Disability Card and Tax Exemption Certificate of the Petitioner.

12. One of the conditions for the grant of an order of review is that there is sufficient reason to do so.

13. I have perused the impugned judgment. It reads in part,

“ 53. In the instant case the petitioner was registered as a PLWD on 17th December 2019. She claims that she obtained a tax exemption certificate from KRA but what she has attached is an acknowledgment of receipt of her application for exemption with a note at the bottom stating that

“This is to acknowledge receipt of your application for Income Tax Exemption. This application shall be forwarded to Eldoret for further processing.”

The Respondent’s Human Resource Policy and Procedures Manual is clear that the mandatory retirement age for its staff will be guided by prevailing government guidelines as may be issued from time to time. In this case the government through the Public Service Commission issued guidelines which require that the employee must be registered by the National Council for Persons with Disabilities and has a tax exemption certificate from the Kenya Revenue Authority as a person with disability.

55. The Petitioner herein does not qualify by virtue of the fact that she does not have the Tax Exemption Certificate which together with the Registration certificate from National Council for Persons with Disabilities are prerequisites for extension of mandatory retirement age from 60 to 65 years.

56. For the foregoing reasons, I find no merit in the petition and accordingly dismiss the same. Each party shall bear its costs.”



14. As stated by the Petitioner’s counsel in the instant application, it is true that the tax exemption certificate did not accompany the Petition as a supporting document. Counsel states that a copy of the same was filed by the Respondent in the Reply to the Petition.
15. Counsel states that the same was supposed to have been filed as annexure MNF-1(b) to the supporting affidavit of Margaret Naliaka Fwamba, the Petitioner but through an honest mistake it was inadvertently left out and the document filed instead thereof was the Application for Exemption.
16. The Employment and Labour Relations Court (Procedure) Rules 2016 now Rule 74, which were applicable at the time, provided for review of a decree or order at rule 33 as follows:
 33. Review
 - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.
 - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.
17. I have confirmed from the court record that indeed the Respondent annexed a copy of the Tax Exemption Certificate as the exhibit marked PL1(b) to the replying affidavit of Paul Mulwo, the Human Resource Officer of the Respondent sworn on 11th July, 2023 as deponed at paragraph 6 thereof.
18. It was therefore an error on the part of the court which is apparent on the face of the record, to find that there was no copy of the Tax Exemption Certificate on record.
19. It is therefore clear that there is indeed sufficient reason to review the court’s judgment in the wake of the now available tax exemption certificate, which was all along on the record.



20. This fact is admitted by the Respondent. It is therefore the court's view that the Respondent cannot be prejudiced by the production of a document by the Petitioner that the Respondent has already placed on the Record.
21. The only reason advanced by the Respondent in declining to extend the retirement age of the Petitioner to 65 years as a person with disability was that the Petitioner/Applicant did not submit her documents to the Respondent for uploading in the Respondent's Human Resource Database at least 3 years before the date of retirement as provided in Regulation 70(2)(b) of the Public Service Commission Regulations dated 28th January, 2020.
22. It is a fact that the Petitioner Applicant submitted the documents for uploading in the Respondent's database on 28th September, 2022 after receiving the notice of retirement dated 10th June 2022.
23. It is evident from the record that the Petitioner/Applicant first sought assistance to obtain a tax exemption certificate from the Respondent in January 2020 but was not successful as is evident from the Respondent's letter dated 23rd January 2020 which is reproduced below.

MOI TEACHING AND REFERRAL HOSPITAL

Ref: [PNO/2307/2020/243](#)

Margaret Naliaka Fwamba
(Principal Nursing Officer)

Through

Director, Nursing Services

TAX EXEMPTION

Reference is made to the above mentioned subject.

This is to inform your request for assistance to obtain tax exemption form Kenya Revenue Authority (KRA) has not been approve.

Further note that the contents of our letter Ref. [PNO/2307/2020/241](#) dated 14th January, 2020 stands.

Be advised accordingly.

Signed

DR. WILSON K. ARUASA, MBS

CHIEF EXECUTIVE OFFICER

24. By letter dated 23rd February, 2022 the Respondent's Chief Executive Officer acknowledged that the Petitioner/Applicant was living with Disability. The same was also acknowledged in a medical report by the Respondent's Consultant Neuro Surgeon, Dr. Boen Kipngetch dated 12th January, 2022. See Exhibit MNF-6 and MNF-7 of Petitioners Further Affidavit sworn on 13th July, 2023.
25. In a letter dated 28th July, 2020 the National Council for Persons with Disability wrote to the Respondent's Chief Executive Officer requesting for a letter stating how the Petitioner disability affected her work performance to enable the Council process her tax exemption application. See Exhibit MNF-8 of Petitioners Further Affidavit sworn on 13th July, 2023.



26. It is thus clear that the Respondent had been aware of the Petitioner/Applicant's disability and the efforts she had made to get registered and to obtain tax exemption, a process which she started before the PSC Regulations the Respondent relies on was promulgated.
27. It was the responsibility of the Respondent to bring the changes in the PSC Regulations to the attention of its employees, the same having been promulgated after the Respondent's Human Resource Policy and Procedures Manual of August, 2018. There is no evidence that the were brought to the attention of the Petitioner/Applicant or any other employee of the Respondent.
28. In light of the foregoing, I find that the Respondent was all along aware of the Petitioner's disability and her efforts to obtain both the disability registration and tax exemption certificates.
29. For the foregoing reasons, I allow the application dated 7th February 2024 and hereby review and set aside paragraphs 54, 55 and 56 of the judgment of this court dated and delivered on 24th November 2024 dismissing the Petitioner's Petition and substitute the same with paragraphs 20 to 27 herein.
30. I therefore make the following orders:
 - a. A declaration that the Petitioner is entitled to retire at the age of 65 as a person with disability in accordance with the provisions of the Person with Disabilities Act.
 - b. An order quashing the notice and retirement letters dated 10th June 2022 and 9th May, 2023 issued to the Petitioner by the Respondent.
 - c. An order that the period when the petitioner was out of employment as a consequence of the letter dated be treated as leave without pay.
 - d. An order that the Petitioner/Applicant resumes duty on 1st November, 2024
 - e. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF OCTOBER, 2024

MAUREEN ONYANGO

JUDGE

