



Republic v Firearms Licensing Board & another; Ahmed (Exparte Applicant) (Judicial Review Miscellaneous Application E089 of 2023) [2023] KEHC 26973 (KLR) (Judicial Review) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E089 OF 2023
JM CHIGITI, J
DECEMBER 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

FIREARMS LICENSING BOARD 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

WAQAR AHMED EXPARTE APPLICANT

JUDGMENT

1. The application before this Court is dated 21st August, 2023 and it seeks the following orders;
 1. That the Applicant be and is hereby granted the relief of an order of Certiorari to remove into this Honourable Court and quash the decision by the Firearms Licensing Board the 1st Respondent herein dated 04/05/2023 and 02/08/2023 rejecting the Applicant’s request for a temporary permit.
 2. That an order of Mandamus directed to Respondents to compel them upon carrying out the requisite inspections to issue to the Applicant all the requisite licenses for the rounds and firearms owned by him and his companies.
 3. That an order of Prohibition directed at the Firearms Licensing Board prohibiting them from arbitrarily confiscating the Applicant’s firearms and that of his companies.
 4. That costs of this Application be provided for.



2. The application is supported by a statutory statement dated 16th August,2023 and Verifying Affidavit sworn by Waqar Ahmed on even date.
3. The Applicant's case is that he has two registered companies known as Ammodump Kwenia Limited and Ammodump Limited whose sole business entails the operation of a shooting range and the sale of firearms and ammunition. The Companies are said to have been in operation for over Ten (10) years.
4. It is the Applicant's case that during the pendency of this period he has adhered and still adheres to the regulations put in place by the Respondent. Further that he is the one who usually calls on the 1st Respondent to come an effect the requisite inspections and approvals as it is the norm.
5. The Applicant states that his companies have worked with the 1st Respondent until recently when it without any justifiable cause withheld and/or refused to renew the Applicant's request for a temporary permit for the purchase of rounds which is the substratum of his business. The Applicant argues that without the rounds the shooting range is actually non-existent and similarly without the firearms the Applicant's companies will collapse.
6. The Applicant argues that the 1st Respondent's actions are calculated to put him out of business. He also states that he was not given any reasons as to why his request for temporal permits and his application for the renewal was rejected.
7. It is the Applicant's case that the 1st Respondent's actions are in violation of his rights as guaranteed under Article 10,24,27,40 and 47 of *the Constitution*. The 1st Respondent's action is said to be discriminative, selective and unfair.
8. In response the Respondents filed a Replying Affidavit sworn by Rashid A. Yakub MBS,DCO who swears to be the Chairman of the Board. The Affidavit is sworn on 23rd October,2023.
9. The deponent argues that the Board's mandate is to regulate and control the management of civilian firearm holders, shooting Ranges and Shooting Clubs as provided for by the *Firearms Act* Cap 114 of the Laws of Kenya.
10. Mr. Rashid also avers that he confirms that the Applicant herein is a Firearms Dealer under Reg. No. GD 31 legally issued by the Board which is valid until 31st December 2023. Further that on 13th February 2023, 17th April 2023 and 17th May 2023 the Applicant applied for Temporary Permits to purchase rounds of ammunitions from Deftech Limited.
11. The said requests it is contended were signed by Mr. Daniel Muraya who is not a licensee for having not been a Director/Shareholder of the Applicant pursuant to the copy of CR 12 marked by the Applicant as 'AK-1A' thus a stranger to the Board.
12. The Board is said to have upon deliberation declined the said requests in accordance with the discretion accorded to it. Further that the Applicant cannot use this court to compel the Board to exercise its discretion in a particular way. It is deposed that this Honourable court cannot be used to curtail the statutory duties of the Board such as the issuance of License to purchase ammunitions.
13. The Respondents' case is that the Board has neither confiscated the Applicant's firearms nor does the Board intend to interfere with the lawful operations of the Applicant. It is also argued that the instant application is apprehensive and speculative and also that it has not in any way misused its authority and/or power, not infringed on the constitutional rights of the Applicant and continues to act within the law.



14. It is also argued that the application as presented offends the doctrine of exhaustion by dint of Section 23 of the [Firearms Act](#).
15. The Ex parte Applicant also filed a Supplementary Affidavit sworn on 26th October 2023. In the affidavit the Applicant argues that Section 23 of the [Firearms Act](#) is not mandatory but discretionary.
16. It is argued that Mr. Daniel Muraya is an employee and a manager at Ammodump, a fact well known to all the parties in the matter including Mr Yakub. Mr Muraya is said to have executed numerous documents on the Applicant's behalf and under the Applicant's directions competently and without any hitch. The deponent states that Mr. Muraya does not deal with the actual purchase and transportation of the ammunition but only writes letters on the Applicant's behalf.
17. The Applicant in his supplementary affidavit argues that upon requesting to meet the Chairman of the 1st respondent over the blatant and unilateral refusal of his request he received word from the board that the chairman had said he personally did not have anything against the Applicant and his company, but could not do anything until the investigating authorities cleared him. He was also advised to get a letter from IPOA stating that he was innocent in regards to the death of one Arshad Shariff.
18. The Applicant avers that he requested the board and by extension the chairman to make the inquiry directly from IPOA in their official capacity since he did not have the capacity to do so as he was neither a police officer nor had he made a report against any police officer to IPOA.
19. On the 10th August 2023 the Applicant's firearm is said to have expired prior to which his brother's (who was in the same vehicle with the shot journalist at the time of the shooting) firearm was taken away by the 1st respondent without any reason when he presented himself for renewal of his license.
20. It is deponed that when he went to renew his license of 23rd August 2023, an officer by the name Mr. Saina stated that they would not renew his license and that he would have to go back the following day to present himself to the board. The Applicant was not allowed to leave his firearm at the Firearms and Licensing Board storage facility. However, upon the Applicant calling his lawyer the said officer renewed the said license for one day.
21. The Applicant also depones that while at the FLB offices he was called by his staff who informed him that police officers stationed at Magadi Police Station arrived at the shooting range and found his wife on site. The officers had been sent by County Commander Mr. Mwongera who it later came to be known had been sent by the Chairman of the Board to Ammodump Kwenia. The officers are said to have asked for copies of Ammodump Kwenia shooting range license which was shown to them and forwarded the same to Mr. Mwongera. The Applicant deposes that they were of the opinion that the officers had been sent to arrest him for illegally being in possession of firearms with an expired license.
22. The 1st Respondent is said to have given an option of paying the sum of Kshs.500/= per day to all as a penalty for every day that an individual was late for renewal.
23. On 24th August 2023, the Applicant is said to have met with the 1st Respondents Board, and as usual, Mr. Rashid Yakubu (the chairman) was not present at this meeting. In the meeting, the board is said to have agreed to renew his license. The Board also gave a go-ahead to make a fresh application for a temporary permit.
24. The Applicant is said to have immediately called his manager Mr. Muraya who dispatched a rider from his Nairobi office to the 1st Respondent's office with a fresh request letter. Upon arrival at office, the rider called the Applicant and informed them that due to the suit, the Board's registry had been instructed not to receive any letters from Ammodump Ltd and Ammodump Kwenia Ltd. The



- Applicant who was still with the Board members alerted the Board upon which the Board spoke to the registry office and the Applicant's fresh requests were duly received.
25. Upon following up on the new temporary permit request Major Elvis one of the Board's staff member informed the Applicant that they would need another request letter for a temporary permit due to the court case that had been filed. The Applicant issued a fourth request for temporary permits. The Applicant depones that they are still following up with Board for those permits to no avail.
 26. The Applicant argues that they ran an honest enterprise with 20 permanent employees and 30 casuals. And also, that they keep meticulous records of all guests that use the range and file the same with Board every month. They also stay firmly within the confines of the law and pay taxes and support the local community. The Applicant depones that all their life savings have been invested into the facility in Kwenia and that they continue to reinvest all income to improve it.
 27. It is the Applicant's averment that Ammodump has suffered serious losses of revenue and that in these tough economic times, such actions can further inflict non-reversible damage to the business.
 28. The Applicant argues that Ammodump the sole business in Kwenia that offers employment to the locals and that they are actively involved in the community-building measures. Further that Ammodump currently runs a school in Kwenia where 48 children attend the school and get meals sponsored by Ammodump. The teacher's salary is also said to be sponsored by Ammodump thus the Board's continued, unjust, illegitimate and unwarranted decisions to deny them their ammunition permits will surely ran them out of business.
 29. The Applicant also argues that previously they would receive letters declining the requests with reasons and suggestions from the Board to either provide further clarification or information which they would endeavour to comply with.
 30. The Application was canvassed by way of written submissions. The Ex parte Applicant filed written submissions dated 27th October, 2023. In the submissions three issues are identified for determination and these are:
 - i. Whether the 1st Respondent's excuse of "unauthorized persons" signing the request for ammunition letter is founded on any law;
 - ii. Whether the 1st Respondent's decision to deny the applicant's application for ammunition without stating any reason was lawful and;
 - iii. Whether the judicial review application offends the doctrine of exhaustion as envisaged under section 23 of the *firearms act*.
 31. The Ex parte Applicant in its submissions cites section 7(3) of the *Firearms Act* on who can purchase, acquire or have in his possession a firearm. It is also submitted that there is no doubt that Mr Muraya is an employee of Ammodump Limited which together with Mr Waqar, holds valid firearm licenses and shooting licenses.
 32. It is also submitted that all documents signed by Mr Muraya as a manager and under the employment of Ammodump (K) Limited did not amount to any violations of the *Firearms Act* as they were only requests for the Directors of Ammodump to purchase ammunition and not the actual purchase of ammunition by the said Muraya hence not illegal or unprocedural.
 33. The case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300 is also cited on the 2nd issue on the grounds to satisfy for the grant of judicial review orders. The Applicant also cites the cases of *Mombasa vs. Republic & Umoja Consultants Ltd*, Civil Appeal No 185 of



- 2001 and Republic vs Kenya National Examination Council ex parte Geoffrey Gathenji & 9 Others, Court of Appeal No 266 on the principle of natural justice and its application where ordinary people would reasonably expect those making decisions that will affect others to act fairly. Section 4 of the Fair Administrative Actions Act is also referred to.
34. It is the Applicant's submission that the drafter of the law made an option rather than mandatory thus allowing a party to weigh where his/her interests will be best served. Section 23 of the *Firearms Act* it is submitted does not oust this Court's original jurisdiction granted under Article 22 of *the Constitution* when it comes to enforcement of a fundamental right in the Bill of Rights as is the case in this Review.
 35. The Applicant also submits that the operative words in the section are 'may' appeal to the Minister, whose decision is final, and that the word 'may' is permissive as opposed to the words 'must' and 'shall' which are mandatory. The case of Republic vs Firearms Licensing Board & Another; Exparte Jimi Wanjigi [2019] eKLR is cited in this regard.
 36. The Applicant submits that Article 47 of *the Constitution* 2010 and the Fair Administrative Act confer jurisdiction to this Court to review administrative actions made by the 1st Respondent however that the same can only be limited in certain cases, and in any case, section 9(2) would only take precedence and direct the applicant to the minister had section 23 of the *Firearms act* been coached in mandatory terms.
 37. Further that the Court is also granted discretion under section 9(4) of the *Fair Administrative Action Act* to exempt an applicant from such alternative dispute resolution mechanisms in exceptional circumstances.
 38. The test applied by the court it is submitted is whether a fair-minded person, who was informed of the circumstances in which the decision against the Applicant was made and having considered the facts, would conclude that there was a possibility that the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, under who 1st Respondent's docket lies and who is the Minister envisaged in section 23 of the *Firearms Act*, is most likely to be biased.
 39. The cases of Stanley Thiong'o Nduati vs Secretary, Firearms Licencing Board & another; Attorney General (Interested Party) [2020] eKLR and Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134 are cited on the test to be applied in determining whether there is a likelihood of bias.
 40. The Attorney General is said to have intimated to the court that the 1st Respondent was waiting for a report from IPOA before responding formally. However, that when the replying affidavit was filed, no report from IPOA was ever filed or referred to.
 41. It is submitted that both the 1st Respondent, the Kajiado county Commandant, and even the police officers who allegedly shot the journalist fall under the direction of the cabinet secretary of the Ministry of Interior and Coordination of National Government who is their boss and the same minister envisaged under Section 23 of the *firearms act*.
 42. This according to the Applicant shows collusion and bad faith among members drawn from different departments of the Ministry of Interior and National Coordination who ganged up to frustrate his business.
 43. In conclusion the Applicant submits that any reasonable person in the applicant's shoes will most likely prefer to move this court since the set of facts as depicted in both his affidavits draw a worrying conspiracy from government agencies and thus this qualifies as exceptional circumstances where the



- applicant believes that his best interests will be best articulated before this court and not through an appeal to the minister.
44. The Respondents in their written submissions dated 1st November, 2023 submit that terms under section 9(2) and (3) of the Fair Administrative Actions Act are couched in mandatory terms and to further buttress this argument the case of Republic v Kenyatta University Ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR where the court in depth examines the use of the word ‘shall’, ‘must’ and ‘may’ in regard to section 9(2) and (3) of the [Fair Administrative Action Act](#).
 45. Similarly, the case of Republic v Firearms Licensing Board & another Ex Parte Stephen Vincent Jobling [2019] eKLR is also cited in this regard. The Court in this case also went ahead to address what constitutes an exception to the rule of the doctrine of exhaustion.
 46. The Respondent also submits that courts must not be burdened with matters where the law has provided alternative mechanisms for dispute resolution. Further that the court should satisfy itself that such mechanisms have been tried and failed and it is only then that a party can be justified in bringing a Judicial Review application.
 47. The Applicant it is submitted has not appealed to the minister neither has he applied for exemption from the requirement of exhaustion of alternative remedies and therefore the instant Application is therefore bad in law should fail. The Respondents also submit that the Ex parte applicant’s motion is essentially a review of the merits of the decision of the Respondent and that for all intents and purposes though it is framed as a judicial review application it is seeking to improperly invoke an appellate jurisdiction of the High Court.
 48. The case of Republic vs. Public Procurement Administrative Review Board & Another Ex parte Gibb Africa Limited & Another [2012] eKLR is also cited where the court set out the established reach of judicial review in Kenya.
 49. The Respondents also submit that the allegations by the Applicant that the actions of the 1st respondent is arbitrary and ultra vires is not true as under section 3(5) and Section 12 of the [Firearms Act](#) the Board is mandated to certify suitability of applicants and periodically assess proficiency of firearms holders; issue, cancel, terminate or vary any licence or permit issued under the act ;register civilian firearm holders, dealers and manufactures of firearms under the act ;register, supervise and control all shooting ranges registered under the act among other duties.
 50. It is the Respondents’ argument that Courts ought not be used to curtail the statutory duties of Statutory bodies as the case herein. The case of Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR is also cited where the court held that “it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question”.
 51. On the prayer for the order of Certiorari the case of Republic v Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited is cited while the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 is cited on the order of Mandamus.
 52. In conclusion it is submitted that the 1st Respondent has not failed to do anything to warrant a compelling order as framed by the Applicant. It is also contended that the Applicant’s supplementary affidavit raised new issues which were not raised by the Respondent in the Affidavit sworn by Mr. Rashid A. Yakub and therefore the court ought not to consider them as a Supplementary Affidavit ought to respond to issues raised in the Replying Affidavit.



53. The Respondents also contend that 1st respondent carried out its statutory duties in accordance with the law and in line with the *Firearms Act*. Further that the application before this court does not meet the basic tenets of a judicial review application and that it should be dismissed in its entirety with costs.

Analysis and Determination

54. The Court has taken into consideration the Parties' respective cases and it finds that 3 issues form for determination and these are as follows;
- i. Whether this court has jurisdiction?
 - ii. Whether this court ought to grant the orders sought?
 - iii. Who is to bear the costs of the suit?

Whether this court has jurisdiction?

55. Section 9 (1) of the *Fair Administrative Action Act* provides an avenue for a party aggrieved by an administrative action to without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*. This, is subject to exhausting all other available remedies. Thus, Section (9) (2) provides in mandatory terms that;

“The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

56. Section 9 (3) of the Fair Administration Action Act provides that;

“The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

57. Section 9 of the Fair Administration Act provides for the procedure for judicial review as follows:

- “(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such



person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

58. The Black’s Law Dictionary 10th Edition, defines the doctrine of exhaustion as follows, “The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary”.
59. In *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

“59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others* [2017] after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:

“What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others vs Aelous (K) Ltd and 9 others.*”

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”
60. In the case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, the Supreme Court made a binding finding that “Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judge and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd [1989] KLR 1, “jurisdiction is everything”.
61. The Respondents’ case is that this Court is divested of the jurisdiction to entertain this dispute as the Applicant has failed to invoke the internal dispute resolution mechanisms provided under section 23 of the *Firearms Act*.
62. This Court is aware that jurisdiction cannot be conferred upon the court by parties or by craft where it did not exist at inception. Section 9 of the *Fair Administrative Action Act* places an obligation on parties to seek leave if they want to be exempted from the doctrine of exhaustion.
63. The Court in the case of Republic v Firearms Licensing Board & another Ex Parte Stephen Vincent Jobling [2019] eKLR held as follows on exceptions to the doctrine of exhaustion;

“The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

The second ground upon which the applicants reasoning and reasons cited must collapse is that, only on an application by the applicant, the court may exempt the person from the obligation to exhaust the remedy. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the FAA Act. The applicant never applied for an exception in this case despite the clear provisions section 9(4), which is couched in mandatory terms. Thus, even if the reasons cited qualified to be exceptional circumstances, his suit would collapse for failing to apply for exemption.

In any event, the person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.”



64. In *Adero v Ulinzi Sacco Ltd* [2002] 1 KLR 577, the question was whether the High Court had jurisdiction to hear a dispute that by statute was reserved for the Co-operative Tribunal. Ringera, J. (as he then was), expressed himself as follows on the issue of jurisdiction:

“On whether the High Court could have had jurisdiction at the time the suit was instituted on the grounds that the Co-operative Tribunal had not been constituted, my view is that jurisdiction either exists or does not exist ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction. And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.”

65. In *Lemita Ole Lemein v. Attorney General & 2 Others* [2020] eKLR, Karanja, J.A. took a similar view and stated:

“In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal. [Emphasis added].”

66. Similarly, in *Kenya Commercial Bank v. Osebe* [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction. The court went ahead to state as follows;

“In our view, the basis of all these decisions is that jurisdiction flows from the often-stated truth that jurisdiction is everything and without jurisdiction, a court must down its tools (See *The Owners of the Motor Vessel “Lillian S” v. Caltex Oil (K) Ltd* (supra)). The question of jurisdiction has been live right from the start of the litigation giving rise to this appeal and we are satisfied that it is properly before us and no party has been taken by surprise or otherwise prejudiced.”

67. The term “jurisdiction” is defined as follows in *Words and Phrases Legally Defined* Vol. 3, page 113:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and



nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.” (Emphasis added).

68. In the case before this court the question of whether or not the Applicant has exhausted the alternative dispute resolution mechanisms before approaching the court was raised and canvassed by parties, the parties argued their rival position and it is this court’s finding and that it has jurisdiction and the discretion to allow this suit to be heard and determined by it.
69. The Court finds that the Applicant has made out a case for the exemption under Section 9 of the *Fair Administrative Action Act*. This court has jurisdiction to hear and determine the substantive issues before it.

Whether this court ought to grant the orders sought?

70. The grounds upon which judicial review orders can be granted were stated in the Ugandan case *Pastoli Vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 where the court held thus:

“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.”

71. The Applicant before this court argues that he was not given any reasons as to why his request for temporal permits and his application for the renewal was rejected. This is despite the fact that he had previously received letters declining the requests with reasons and suggestions from the Board to either provide further clarification or information which he would endeavour to comply with.
72. The Respondents in response contends that the said requests were signed by Mr. Daniel Muraya who is not a licensee for having not been a Director/Shareholder of the Applicant pursuant to the copy of CR 12 marked by the Applicant as ‘AK-1A’ thus a stranger to the Board.
73. It is also argued that the Board reached the said decision owing to the discretion accorded to it. The Respondents continue to argue that the instant application is apprehensive and speculative and also



that it has not in any way misused its authority and/or power, not infringed on the constitutional rights of the Applicant and continues to act within the law.

74. This court has had a look at the letters dated 4th May,2023 and 2nd August 2023 addressed to one Mr. Muraya from Mr. Rashid Yakub MBS, DCO the Chairman Firearms Licensing Board. Both letters read as follows;

“RE: REQUEST FOR A TEMPORARY PERMITS

Reference is made to your letters dated 17th May,2023 on the above subject matter.

This is to inform you that the Board has declined the above request.”

75. It is clear that none of the two letters give reasons as to why the said requests for temporary permits were declined neither is there evidence that the Applicant was given an opportunity to be heard before the said administrative decision was reached.

76. Article 47 (1) of *the Constitution* states as follows;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”

77. Article 47(2) continues to state as follows;

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

78. Article 47 has now been effectuated by the *Fair Administrative Action Act*, 2015 under which section 4(3) provides as follows:

“(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.

79. It is my finding that the letters dated 4th May,2023 and 2nd August,2023 are illegal as they do not accord with Article 47 as effectuated by the *Fair Administrative Action Act*, 2015 under section 4(3).



80. The Court in the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR held as follows;

“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.”

81. In our instant case the 1st Respondent failed to observe the rules of natural justice in reaching the decision contained in its letters of 4th May, 2023 and 2nd August, 2023.

82. The Ex parte Applicant had a legitimate expectation that as had previously been done by the 1st Respondent reasons would be given for the Board’s decision. However as evidenced by the two letters this was never forthcoming.

83. The Ex parte Applicant and his team provide basic needs such as education, food and employment for residents at Kwenia and therefore the Board’s continued denial to issue the Ex parte Applicant with the said permits has an adverse effect on the said business and in extension infringes upon the rights of the people Kwenia as envisaged under Article 43 of *the Constitution*. It also infringes upon the rights of the Ex parte Applicant as provided under Article 24.

84. The Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & others (supra) the Court held as follows;

“What does an ORDER OF Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....”

85. In Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

“The Order of “Prohibition” issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It’s an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi’s Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction.”

Although Prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by Prohibition. Certiorari and Prohibition frequently go hand in hand, as where Certiorari is sought to quash the decision and Prohibition to restrain its execution. But either remedy may be sought by itself.”



86. In seeking the prayer for an order of Prohibition, the Ex parte Applicant relied on the case of Republic v Principal Kadhi, Mombasa & Another Ex-parte Alibhai Adamali Dar & 2 others [2022] which provided that:

“The Order of "Prohibition" issues where there are assumption of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction." (... ..) "Although Prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by Prohibition. Certiorari and Prohibition frequently go hand in hand, as where Certiorari is sought to quash the decision and Prohibition to restrain its execution. But either remedy may be sought by itself."

87. In light of the above this court is convinced that the Applicant has made a case for the grant of the orders sought.

Who is to bear the costs of the suit?

88. It is trite that costs follow the event. The Court in the case of Sonko v Clerk, County Assembly of Nairobi City & 12 others (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling) held as follows;

The guiding principles applicable in costs were as stated in Jasbir Singh Rai where we stated that costs follow the event with the discretion of the court exercised judiciously by stating:

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.

Orders;

- i. The application dated 21st August, 2023 allowed.
- ii. An order of Certiorari removing into this Honourable Court and quashing the decision by the Firearms Licensing Board the 1st Respondent herein dated 04/05/2023 and 02/08/2023 rejecting the Applicant's request for a temporary permit is hereby granted.
- iii. An order of Mandamus directed to the Respondents compelling them upon carrying out the requisite inspections to issue to the Applicant all the requisite licenses for the rounds and firearms owned by him and his companies is hereby granted.
- iv. An order of Prohibition directed at the Firearms Licensing Board prohibiting them from arbitrarily confiscating the Applicant's firearms and that of his companies is hereby granted.
- v. The Applicant shall have the costs of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DECEMBER 2023.



JOHN CHIGITI (SC)
JUDGE

