



Republic v Chairman of the Firearms Licensing Board & 3 others; Mohammed (Interested Party) (Judicial Review 3 of 2020) [2022] KEHC 13428 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
JUDICIAL REVIEW 3 OF 2020
WM MUSYOKA, J
SEPTEMBER 23, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

CHAIRMAN OF THE FIREARMS LICENSING BOARD 1ST RESPONDENT

FIREARMS LICENSING BOARD 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

AND

RASHID ECHESA MOHAMMED INTERESTED PARTY

RULING

1. This is one of the matters that I took over from F Amin J on June 16, 2022. It was scheduled for ruling on May 26, 2022.
2. The matter for determination is the motion dated October 4, 2021. It seeks two principal prayers. One, a notice to issue to the 3 named State officials, to show cause why they should not be punished for disobeying the order given on February 3, 2020. Two, such other or further orders as the court may please.
3. The factual background and the grounds on which the motion is premised are set out on the face of the application and the affidavit in support, sworn on October 4, 2021, by the *ex parte* applicant, Rashid Echesa Mohammed. It is averred that the orders were made on February 3, 2020 directed at the 1st and 2nd respondents. It is averred that the orders restrained them from interfering with his firearms. It is averred that the orders were disobeyed, for the guns had not been surrendered to the *ex parte* applicant,



- nor the revocation lifted, nor reasons given for non-compliance. A copy of an order dated February 5, 2020 being a purported extract of an order made by Njagi J on February 3, 2020 is attached.
4. The *ex parte* applicant swore a supplementary affidavit, on October 28, 2021. He identifies Chief Inspector Moses Mwangati and Inspector Maurice Amwayi as the police officers who took away his firearms, and who had disobeyed the court order by refusing to return his firearms. He identifies Peris Kimani as the Police Commander for the Western Region, and as the person who had instructed Chief Inspector Mwangati and Inspector Amwayi to seize his firearms. Charles Mukinda is identified as the Chairman of the 2nd respondent, the Firearms Licensing Board.
 5. The 4th respondent reacted to the application, *vide* the affidavit sworn by Peris Kimani, on November 17, 2021. She avers that she had not been served with the order of February 3, 2020, saying that she only learnt of it through the instant application. She further avers that she had never handled the firearms nor the certificates relating to them, and had never been possession of either of them. She further avers that she had never been served with any order directing her to release any firearms to the *ex parte* applicant. She further avers that the order of February 3, 2020 merely granted leave to the *ex parte* applicant to apply for judicial review, it did not quash the decision by the 2nd respondent to revoke the certificate issued to the *ex parte* applicant. She avers that the *ex parte* applicant was giving misleading information, to effect that the court had directed surrender of the firearms to him. She avers that the officers who confiscated the firearms were not acting on her orders. She avers further that she has not been served with any order requiring her to perform any function with respect to the matter. She says the order of February 3, 2020 did not direct her to do anything, it merely stayed the decision of the 2nd respondent, asking the *ex parte* applicant to surrender his firearms.
 6. The response by the 1st and 2nd respondents is by Charles Mukindia, the 1st respondent, through his affidavit of November 22, 2021. He avers that the order of February 5, 2020 was served on the 2nd respondent on October 8, 2021. He avers that he, as 1st respondent, was not personally served with the order of February 5, 2020, and that the same was brought to his attention on October 18, 2021, when the instant application was filed. He avers that the order of February 5, 2020 granted leave to the *ex parte* applicant, which was to operate as stay of the direction by the 2nd respondent to withdraw the certificates held by the *ex parte* applicant. He states that by the time the order of February 5, 2020 was given, the *ex parte* applicant had already been given notice, dated January 28, 2020, revoking his certificates. He avers that the order of February 5, 2020 did not direct the 2nd respondent to release the subject firearms. He asserts that neither he nor the 2nd respondent had disregarded the order of February 5, 2020. He further avers that neither he nor the 2nd respondent was served with any court order quashing the decision to revoke the firearm certificates issued to the *ex parte* applicant. He further avers that the order made was for grant of leave to the *ex parte* applicant to apply for judicial review orders, and not to quash the decision of the 2nd respondent to revoke the firearm certificates held by the *ex parte* applicant. He avers that the *ex parte* applicant was misleading the court that there was an order for the surrender of his firearms. He avers that he was never served with any order directing him to reinstate the firearms certificates of the *ex parte* applicant.
 7. There is another affidavit by Chief Inspector Maurice Amwayi, sworn on an unknown date in 2022, but filed herein on February 25, 2022. I doubt whether this affidavit has anything to do with the application that I am determining, dated October 4, 2021, for it is sworn in response to an application dated November 26, 2021 and served on November 29, 2021. There is no such application on record here, dated November 26, 2021. Probably the affidavit was meant to be filed in a different cause.



8. The application dated October 4, 2021 was argued before F Amin J on March 31, 2022. Both sides recited the substance of their respective filings with respect to that application. No statutory provision nor case law was cited.
9. What I am called upon to determine is whether the orders of February 5, 2020 were disobeyed, so that, if they were, I should call upon the respondents to show cause why they should not be cited for contempt of court. What is for consideration herein is whether there was a court order in force that the respondents were required to act on, whether that order was brought to their attention, and whether, upon it being brought to their attention, the respondents acted or omitted to act in a manner that amounted to contempt of the order or the court.
10. The starting point should be whether the court order of February 5, 2020 required the respondents to act on it, so that, ultimately, failure by them to act amounted to contempt of court.
11. The formal order of February 5, 2020 was premised on the motion, dated February 3, 2020, that was placed before Njagi J on February 4, 2020, premised on order 51 rule 1 of the Civil Procedure Rules, seeking leave to apply for the judicial review orders of *certiorari* and prohibition, and a stay, ostensibly of the decisions the subject of the judicial review orders in respect of which leave was being sought. The prayers sought in the Motion dated February 3, 2020, are as follows;

- “ 1. THAT the application is certified as urgent and will be heard *ex parte* and on priority basis.
2. THAT leave is granted for the applicant to apply for the following judicial review orders:
 - a. THAT an order of *certiorari* to move into this honourable court and quash the decision of the 1st respondent revoking the applicant’s firearm certificate No 0584 and withdrawing his firearms namely pistol P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872.
 - b. THAT an order of prohibition prohibiting the respondents from revoking applicant’s firearm certificate No 0584 or withdrawing his arms namely pistol P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872 in future without following the laid down procedure.
3. THAT the leave granted does operate as stay of the direction to surrender the firearm certificate No 0584 or withdrawing his firearms namely P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872 pending hearing and determination of this application.
4. That the costs of this application be provided for.”

12. Njagi J allowed the orders in the motion of February 3, 2020 as prayed. The order issued on February 5, 2020, extracted from the order made on February 4, 2020, reads as follows:

“Upon the application dated February 3, 2020, coming up under certificate of urgency on February 4, 2020 before Hon J Njagi -Judge in the absence of all the parties and upon considering the aforementioned application;

IT IS HEREBY ORDERED AS FOLLOWS;



1. THAT the application is certified as urgent and will be heard *ex parte* and on priority basis.
2. THAT leave is granted for the applicant to apply for the following judicial review orders:
 - a. THAT an order of *certiorari* to move into this Honourable Court and quash the decision of the 1st Respondent revoking the applicant's firearm certificate No 0584 and withdrawing his firearms namely pistol P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872.
 - b. THAT an order of Prohibition prohibiting the respondents from revoking applicant's firearm certificate No 0584 or withdrawing his arms namely pistol P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872 in future without following the laid down procedure.
3. THAT the leave granted does operate as stay of the direction to surrender the firearm certificate No 0584 or withdrawing his firearms namely P-BARRETA FO 92S/MO A022182Z AND CESKA CZ S/NO 0641872 pending hearing and determination of this application.
4. That the costs of this application is provided for.”

13. The *ex parte* applicant wanted to initiate judicial review proceedings to have the court quash a decision that had been made to revoke his firearm certificate number 0584 and withdrawal of two of his firearms, and to have the respondents prohibited from revoking the said certificate or certificates and from withdrawing the 2 firearms. The stay order was sought to have the decisions to revoke the certificate and withdraw the firearms frozen or suspended pending hearing and determination of the substantive judicial review application, to be filed.
14. In judicial review proceedings, at the stage of seeking leave, the principal prayer is for leave, while the prayer for stay is secondary, for it rides on the leave prayer. The terms of the stay order are, necessarily, to be framed based on the terms of the leave order. The stay to be granted should be of the decision or decisions the subject of the leave sought and granted. The stay should be of nothing more than or beyond the decisions that are the subject of the *certiorari* or prohibition orders sought. I have closely considered the stay granted herein, and I do find that it was dependent on the *certiorari* and prohibition orders that the leave was granted in respect of, although it relates to only one aspect of those prayers. The stay is about the direction to surrender the firearm certificate, while the leave was about quashing the decision to revoke the certificate and its surrender. The aspect, in the stay order, on the withdrawal of the firearm, is aligned to the leave granted.
15. Was the order of February 4, 2020, as extracted on February 5, 2020, one that required the respondents to do anything? I do not think the order required them to do anything. It merely says that their decision to revoke the certificate and withdraw the firearms was stayed. It meant that those decisions were stopped, not revoked or annulled. No action was to be taken on them, in terms of implementation, until the court made final orders on the main judicial review application to be filed upon grant of the leave. No steps were to be taken by the respondents in terms of carrying through, or to effect, the purport of the decisions sought to quashed. The respondents were, therefore, not required to do anything, other than refraining from taking any further steps to carry to effect the intended revocation



of the certificate and withdrawal of the firearms. With respect to the firearms, it means that the same should not be withdrawn, and if they had already been withdrawn, as at the time the orders were made, then the respondents should just retain custody of them until final orders are made in the substantive Judicial Review application. The effect of the stay orders was not to lift or reverse or quash the revocation of the certificate nor to order surrender of the firearms, if they had been withdrawn by the time the order was being made. So the direction in the stay order, to the respondents, was not to take any step with respect to the revocation and the withdrawal.

16. Action can only be taken against a person, with respect to contempt of a court order, where existence of the order has been brought to the attention of the person who is required to act on it. The standard practice, with respect to securing compliance with court orders, is service of the said orders. The rules relating to service are set in the *Civil Procedure Rules*. Service is by a certified process server, who should, after the service, file an affidavit in court, detailing what he or she had done with respect to the service. This is what is called returning the service. The process server would be available for cross-examination, should the service be contested, to give an account of the service.
17. Was the order dated February 5, 2020 served on the respondents? The *ex parte* applicant says that it was served on the 1st and 2nd respondents, on a date which he does not disclose. Is there evidence of that service? The *ex parte* applicant has not filed an affidavit of service, by a court process server, to attest to the alleged service, so there is no return of the alleged service, and there is no one to hold accountable for the alleged service. What the *ex parte* applicant relies on is a copy of the order extracted on February 5, 2020, exhibited to his affidavit of October 4, 2021, bearing a purported stamp of the 2nd respondent. The stamp does not indicate the date of receipt, and does not bear the signature of the person who allegedly received the document being served. As stated above, the proper way to prove service is to return the service. That was not done here, and as a consequence, I shall attach no weight to the alleged service. I find and hold that the *ex parte* applicant has not provided any proof that he served the said orders on the respondents for them to be said to have disobeyed the order.
18. The 1st respondent denies being served with the order, but says that the said order was served on the 2nd respondent on October 8, 2021. He provides no proof of such service, for the copy of the order said to have been served on October 8, 2021 is not attached to his affidavit, despite it being alleged, in the affidavit that it is attached. There is no annexure to the affidavit that was received at the registry on November 22, 2021. The 4th respondent avers that there was no service upon him. However, the burden was on the *ex parte* applicant to prove the service, and I have already found, in paragraph 17 hereabove, that there was no evidence that the order in question was ever served.
19. The next consideration is as to whether the order was disobeyed. The disobedience that the *ex parte* applicant alludes to is with respect to the respondents surrendering or releasing the firearms to him. It is my holding and finding above, that the order of February 4, 2020, as extracted on February 5, 2020, did not require the respondents to take any positive step, the requirement was to refrain from doing something. Secondly, I have also found and held that the order did not require the respondents to surrender any firearms to the *ex parte* applicant. Consequently, the issue of the respondents surrendering firearms did not arise. To that extent, it cannot be said that the respondents have disobeyed the order dated February 5, 2020.
20. For avoidance of doubt, the stay order of February 5, 2020, reads as follows:

“THAT the leave granted does operate as stay of the direction to surrender the firearm certificate No 0584 or withdrawing his firearms namely P-BARRETA FO 92S/MO



A022182Z AND CESKA CZ S/NO 0641872 pending hearing and determination of this application.” (emphasis added)

21. There is another issue that the *ex parte* applicant has referred to, which I think is irrelevant. It is about the firearms of 5 Members of Parliament, whose names are mentioned in the application, not being withdrawn, and their certificates not being revoked, yet they were at the same function, which gave rise to the action taken against him. I think that issue is irrelevant as it has nothing to do with the issue at hand, contempt of the court order made on February 4, 2020.
22. The last issue that I should consider is on whether the instant suit or cause is still alive, to form basis, or foundation, for the application that I am considering. The issue was not argued before F Amin J on May 31, 2022, but it is a preliminary issue, that goes to jurisdiction.
23. Judicial Review proceedings have two stages. The first stage is the leave stage, where the *ex parte* applicant comes to the High Court for leave to initiate judicial review proceedings, for specific judicial review orders. If leave is granted, the *ex parte* applicant then files the substantive Motion for the judicial review orders. According to order 53 rule 3(1) of the [Civil Procedure Rules](#), the substantive motion for the judicial review orders, in respect of which leave has been granted, should be filed within 21 days. Where the substantive application is not filed within 21 days, the leave order would lapse, and so would any orders granted with it. The time within which the substantive application is to be filed is set or limited by statute. It is not open-ended or elastic. As stated elsewhere, the stay order is an appendage to the leave order, and where the leave order lapses, for whatever reason, the stay order would lapse with it.
24. Order 53 rule 3(1) of the [Civil Procedure Rules](#) says as follows:

“Where leave has been granted to apply for an order of *mandamus*, prohibition or *certiorari*, the application shall be made within twenty one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”
25. Njagi J granted leave on February 4, 2020, for the bringing of the substantive application. The court did not limit the time within which the application was to be filed. There was no need for that as order 53 rule 3(1) is in clear terms. That meant that the time limitation set in order 53 rule 3(1) applied. The 21 days. The time began to run from February 4, 2020. 21 days expired on or about February 25, 2020. I have very closely perused through the file of papers before me, and I have not come across the substantive application that should have been filed within 21 days from February 4, 2020. If no substantive application for judicial review orders was filed, then the leave and stay order of February 4, 2020 expired on or about February 25, 2020. The cause died. That would mean that there was no foundation for mounting the application dated October 4, 2021, making the same misconceived, incompetent and an abuse of the court process.
26. It may also be worth mentioning that the application for leave was premised on order 51 rule 1 instead of order 53 rule 1 of the [Civil Procedure Rules](#). But that is water under the bridge for leave was granted, and the *ex parte* applicant ought to have followed that with filing a substantive motion for the orders for which leave was granted.
27. The application dated October 4, 2021 asks me to cite the respondents for contempt of a court order made on February 3, 2020. Of course, no order was made on February 3, 2020. The application dated February 3, 2020 was placed before Njagi J on February 4, 2020, and the judge granted it on the said date, and a formal order was extracted on February 5, 2020, ostensibly for service on the respondents. Consequently, I am being invited to enforce a non-existent order. No effort was made by the *ex parte*



applicant to rectify the motion of October 4, 2021, prior to the same being fixed for ruling. It is being suggested that the respondents be punished for disobeying an order which does not exist in the first place. I am alive to article 159 of the Constitution, but contempt of court proceedings are quasi-criminal in nature, for they carry criminal sanctions, and due process must be strictly adhered to.

28. I believe I have said enough to demonstrate that the orders sought, in the application dated October 4, 2021, are not available for making or granting. That application has no merits. I shall accordingly dismiss the same, which I hereby do. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Khaemba, instructed by Bryan Khaemba, Kamau Kamau & Company, Advocates for the *ex parte* applicant.

Ms. Were, instructed by the Attorney-General, for the respondents.

