



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E1119 OF 2020

BETWEEN

JJ OKWARO & CO LIMITED.....APPLICANT

VERSUS

THE FIREARMS LICENSING BOARD.....RESPONDENT

RULING

Introduction

1. This ruling is on the Respondent's Notice of Preliminary Objection dated 4th November 2020, which this Court directed be heard and determined together with the Applicant's Notice of Motion application dated 13th November 2020. The genesis of the said objection and application is an Originating Notice of Motion application dated 16th October 2020 filed by the Applicant, in which it was seeking various orders, including temporary orders that are still pending, as follows:

- 1. THAT service of this Application be dispensed with in the first instance in respect to prayers 2, and 3.**
- 2. THAT a temporary order be issued to stay the Respondent's decision of revocation of the Applicant's firearm dealers' registration/certificate No GD15 pending the hearing and determination of the Application.**
- 3. THAT directions be issued for the expedited hearing and determination of these proceedings.**
- 4. THAT at the hearing hereof the Respondents decision of revocation of the Applicant's firearm dealers registration/certificate No GD15 contained in the letter dated 8th October, 2020 be quashed.**
- 5. THAT at the hearing hereof the Respondent be prohibited from interfering with the Applicants business in any manner whatsoever.**
- 6. THAT at the hearing hereof the Respondent be directed to forthwith:**
 - a) Reinstate the Applicant's registration as a Firearms Dealer**
 - b) Grant the Applicant a new certificate of registration for the year 2020 in accordance with the law**
- 7. THAT the costs of this application be provided for.**

2. The main grounds for the Originating Notice of Motion application were that the Applicant is and has been a registered firearms dealer from the year 2002 and has been granted annual certificates of registration from then to the year 2018. Further, that by a letter dated 8th October 2020, the Respondent purported to "revoke" the Applicant's Dealers License No. GD15 for a number of reasons which were detailed in the application.

3. On 16th October 2020, this Court directed the Applicant to serve the Respondent with the said application for *inter partes* hearing. The Respondent thereupon filed the Notice of Preliminary Objection dated 4th November 2020, on the grounds that the Application offends the provisions of Order 53 Rule 1 of the Civil Procedure Rules 2010 as well as sections 8 and 9 of the law Reform Act, and that the application offends the Provisions of section 23 of the Firearms Act as read together with section 9(2) of the Fair Administrative Actions Act.

4. The Applicant subsequently filed the Notice of Motion dated 13th November 2020 seeking to be exempted from the Provisions of Section 23 of the Firearms Act 2012. The grounds for the application are that the appeals mechanism under section 23 of the Firearms Act is not mandatory, and that a party may elect to subject themselves to the said process or appeal directly to a court of competent jurisdiction. Furthermore, that the appeal mechanism 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.

5. The Applicant also averred that the Cabinet Secretary to whom appeals lie under section 23 of the Firearms Act is the author of the original direction to suspend all dealers' licenses, including that of the Applicant, which gave rise to the impugned decision by the Respondent, and cannot be expected to be a fair arbiter on the same. In addition, that the said Cabinet Secretary has by his words and conduct publicly and repeatedly expressed hostility, malice and bias against registered firearms dealers, including his desire to reduce the number of registered dealers in the country. Therefore, that the Minister to whom appeals lie under the Firearms Act is indistinguishable from the Respondent, and that an Appeal to the said minister would be an academic and futile exercise. Lastly, that the time provided under the Act for an Appeal to the minister has since expired.

6. The Applicant therefore contended that he had demonstrated exceptional circumstances for which this Court should exempt the Applicant from the provisions of Section 23 of the Firearms Act in the interest of justice, and he has in his possession substantial quantities of firearms and ammunition, and is apprehensive that its rights to that property may be violated at any moment absent the protection of this court.

The Submissions

7. Munene E. Wanjohi, a Senior State Counsel in the Attorney General's Office, filed written submissions dated 27th January 2021, wherein he submitted that the Respondent's preliminary objection is on a point of law, which would dispose of the suit, as held in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A.696**. Further, that the Respondent is not seeking an exercise of discretion, but seeks to determine if the instant application as drawn is fatally defective. Therefore, that the objection herein is well taken, because if it succeeds the court will be saved the cost of a lengthy hearing and attendant expenses on either side.

8. The Respondent's grounds are firstly, that in the present application, the Applicant moved the court through a Notice of Motion as opposed to a Chamber Summons application, as required by Order 53 rule 2 of the Civil Procedure Rules 2010. Further that the Applicant has not sought leave as required by order 53 rule 1 and 2 of the said Rules, as read together with Section 8 and 9 of the Law Reform Act. Accordingly, that the application ought to be struck out for being incompetent and fatally defective.

9. Secondly, that the Applicant has failed to exhaust the remedies available to them under Section 23 of the Firearms Act, in that he has not lodged an appeal against the alleged decision with the Minister. In the circumstances, that the application for judicial review to this court is barred by Section 9 (2) and (3) of the Fair Administrative Action Act, which provides for exhaustion of internal mechanisms for appeal or review before institution of judicial review proceedings. The Respondent further submitted that the Applicant's application dated 13th November, 2020 is unprocedural as the applicant ought to apply for exception before the main application.

10. The Respondent invited the Court to take notice of the mandatory terms in the said provisions of the Fair Administrative Action Act which use of the word "shall", and relied on the interpretation of the said sections in the cases of **Republic vs Kenyatta University ex parte Ochieng Orwa Domnick & 7 Others [2018] e KLR** and **Republic vs Firearms Licensing Board & another Ex Parte Stephen Vincent Jobling [2019] e KLR**, and to adopt a similar construction and hold that the applicant ought to have first exhausted the appeal mechanism provided for in Section 23 of the Firearms Act.

11. Lastly, the Respondent submitted that it is mandated by law under the Firearms Act to license to firearm dealers through the Ministry of Interior and Co-ordination of National Government. Therefore, the allegation by the Applicant that its actions are arbitrary and *ultra vires* is not true, and that the Courts ought not be used to curtail the statutory duties of Statutory bodies. Reliance was placed on the decision in **Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** that the remedy of judicial review is not concerned with the merits of a decision, but with the decision making process itself. In this respect, it was submitted that the procedural aspect of revoking the Applicant's firearm dealership license were followed and that the Respondent carried out its statutory duties in accordance with the law and in line with the Firearms Act.

12. E. Sifuna & Company Advocates filed submissions dated 8th December 2020 on behalf of the Applicant, and contended that the instant application is properly filed under the provisions of the Fair Administrative Actions Act 2015. The counsel detailed the grounds for the application, the alleged illegalities committed by the Respondent, as well as the particulars of the violation of his rights to Fair Administrative Action as guaranteed by Article 47 of the Constitution, and various provisions of the Fair Administrative Action Act. According to the Applicant, sections 7, 9, 11 and 12 of the Fair Administrative Actions Act 2015 grants this Court jurisdiction to hear and determine the instant application herein, and best protects his rights in the instant suit, and he cannot be compelled to rely on Order 53 of the Civil Procedure Rules in this regard. The decision in the case of **James Gacheru Kariuki & 22 others vs Kiambu County Assembly & 3 Others [2017] eKLR** was cited in this regard.

13. Thus, Section 9(1) of the Fair Administrative Actions Act is explicit that 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, and creates an avenue for an aggrieved party to directly approach the High Court for relief, and does not require the party to mould an application for relief within the confines of the existing Order 53 of the Civil Procedure Rules.

14. On whether the Applicant should have exhausted other remedies under section 23 of the Firearms Act, it was submitted that there exist exceptional circumstances to exempt him from the requirement of the said section. Further, that in the interests of justice and pursuant to section 9 (4) of the Fair Administrative Action Act, the Applicant needed to bring before this court material evidence of the said exceptional circumstances by way of affidavit, necessitating the formal application for exemption, which could only be made once the question became material.

15. According to the Applicant, the appeal mechanism under section 23 of the Firearms Act is not mandatory, and a party may elect to subject themselves to the said process or appeal directly to a Court of competent jurisdiction. Further, that it is instructive that section 23 of the Firearms Act 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. The Applicant in this respect submitted that the operative words in 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. Reliance was placed on the interpretation of the said words in the case of **Republic vs Firearms Licensing Board & Another; ex parte Jimi Wanjigi (2019)eKLR**

16. The Applicant further submitted that the remedy of an appeal under section 23 of the Firearms Act would not be effective, fair, and accessible, and would therefore be futile. The reasons given by the Applicant for this position were that the Cabinet Secretary to whom appeals lie under Section 23 of the Firearms Act 2012 is the author of the original direction to suspend all dealers' licenses, including that of the Applicant, which gave rise to the impugned decision by the Respondent, and cannot be expected to be a fair arbiter on the same. Further, that the said Cabinet Secretary has by his words and conduct publicly and repeatedly expressed hostility, malice and bias against registered firearms dealers, including his desire to reduce the number of registered dealers in the country.

17. Therefore, that any fair minded and informed observer would presume bias on the part of the Cabinet Secretary, and that the test to be applied in determining whether there is a likelihood of bias was stated in the case of **Stanley Thiong'o Nduati vs Secretary, Firearms Licencing Board & another; Attorney General (Interested Party) [2020] eKLR** which relied in the case of **Beatrice Wanjiru Kimani vs Evanson Kimani Njoroge (1995-1998) 1 EA 134**, and wherein it was found that the alternative mechanism of an appeal to the same Cabinet Secretary was not an effective and fair remedy for the applicant therein, and the exception under section 9(4) of the Fair Administrative Action therefore applied.

18. Lastly, the Applicant submitted that the time provided under the Act within which an Appeal to the minister is to be made has since expired, therefore the remedy is no longer available. The decision in **Republic vs Firearms Licensing Board & Another ex parte Jimi Wanjigi (2019) eKLR** that factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. Also relied upon were the decisions in **Mohammed Ali Baadi and Others vs The Attorney General and 11 Others, (2018) e KLR** and **Republic vs Secretary of the Firearms Licensing Board & 2 others ex parte Senator Johnson Muthama (2018) eKLR** as to when an alternative dispute resolution mechanism may not be appropriate.

19. In conclusion the Applicant submitted that this Court has jurisdiction to hear and determine this matter as proved under Article 165 as read together with Articles 47 and 23 of the Constitution, and that he may not have the quality of audience in a fair manner on appeal to the Minister.

The Determination

20. Two preliminary issues have been raised by the Respondent as regards the competence of the Applicant's Originating Notice of Motion application, and the jurisdiction of this Court. Before determining the two preliminary issues, it is necessary to clarify the circumstances in which a preliminary objection may be raised. The purpose and nature of a Preliminary Objection was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

21. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

22. The two preliminary issues raised will therefore be examined in the light of the foregoing principles.

On the Competence of the Originating Notice of Motion

23. The Respondent contends that the Applicant did not seek the leave of the Court prior to seeking the judicial review orders herein in his Originating Notice of Motion, and reliance has been placed in this regard on the provisions of Order 53 of the Civil Procedure Rules. The Applicant's position on the other hand is that he cannot be straitjacketed to the provisions of Order 53, and that he has rightly brought his application pursuant to the provisions of the Fair Administrative Action Act.

24. I note in this regard that the Applicant's Notice of Originating Summons was brought pursuant to sections 7, 9, 11 and 12 of the Fair Administrative Act. Section 7 of the said Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to *inter alia* a court.

25. The procedure and applicable conditions for one to apply for such review are set by section 9 of the Act, which provides 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 subsection (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.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

26. Section 10 of the Act specifically provides that applications for judicial review shall be heard and determined without undue regard to procedural technicalities, and the Chief Justice is granted discretion and power to make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action. No such regulations have however been made.

27. It is notable in this regard that the requirement of leave applies to applications brought under Order 53 of the Civil Procedure Act, and the instant application was not brought pursuant to the provisions of the said Order. In addition, in light of the provisions of sections 7, 9 and 10 of the Fair Administrative Action Act, it is the finding of the Court that there was no requirement for leave to be granted by this Court at the time of filing of the Applicant's Originating Notice of Motion, as it was exclusively brought pursuant to the provisions of the Fair Administrative Action Act.

28. I am also in agreement with the holding in James Gacheru Kariuki & 22 others vs Kiambu County Assembly & 3 Others [2017] eKLR ,

“Parliament, in giving effect to Article 47 of the Constitution has now enacted the FAAA which provides an avenue for bringing such a suit by an aggrieved party. That avenue is provided for in Section 9 of FAAA.

Notably, the avenue provided by Parliament does not compel parties to use the straitjacket of Order 53 of the Civil Procedure Rules to access the High Court.

33. In my view, therefore, the procedure provided for challenging administrative actions in the FAAA is, at the very least, an alternative means of instituting proceedings un-encumbered by the rigid procedural requirements of Order 53. Thus, Section 9(1) of the FAAA is explicit that:

(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.

34. This Section self-consciously creates an avenue for an aggrieved party to directly approach the High Court for relief. The Section does not require the party to mould her application for relief within the confines of the existing Order 53 of the Civil Procedure Rules. Instead Section 9(1) of FAAA simply allows a party aggrieved by an administrative decision or action of a public body to make an appropriate application to the High Court.”

29. The Originating Notice of Motion filed herein by the Applicant is therefore found to have competently filed and brought as against the Respondent for the foregoing reasons.

On Jurisdiction.

30. The second preliminary issue raised by the Respondent is that there is an internal appeals mechanism under section 23 of the Firearms Act that the Applicant has not exhausted, hence this Court is divested of jurisdiction to hear the instant application. The Applicant's position is that the appeal mechanism under section 23 of the Firearms Act is not mandatory, and that section 23 of the Firearms Act does not oust this Court's original jurisdiction granted under the Constitution.

31. I am guided by the decision in Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1 when dealing with the issue raised about this Court's jurisdiction. Nyarangi JA (as he then was) held as follows in this regard:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

32. The Court of Appeal proceeded to define jurisdiction and its source as follows:

“By jurisdiction is meant the authority which a court as 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 the 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

33. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts, and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked to review the lawfulness of the Respondent’s actions and decisions, in exercise of its supervisory jurisdiction. In addition, Article 47 of the Constitution and the Fair Administrative Act also confer jurisdiction to this Court to review administrative actions made by the Respondent.

34. Therefore, this is a case where this Court ordinarily has jurisdiction, and this Court’s constitutional jurisdiction cannot be divested by statutory provisions, but can only be limited in certain respects. Put another way, the availability of an alternative statutory remedy does not affect the Court’s jurisdiction to entertain a claim for judicial review, but is a material consideration in the exercise of the Court’s discretion to grant the relief sought. The main reason for this limitation is that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised. In addition, 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. As a result, the availability of an alternative remedy cannot be raised as a preliminary point of law to challenge this Court’s jurisdiction for these reasons.

35. The relevant questions that requires to be asked in such cases is not a jurisdictional one, but whether in the circumstances of a case, this Court ought to defer to alternative statutory dispute resolution mechanisms, or whether there are any valid grounds demonstrated that allow an applicant to by-pass the alternative statutory dispute resolution mechanism. This is the main issue in the Applicant’s Notice of Motion dated 13th November 2020, and shall be considered next, in relation to the procedure set out in section 23 of the Firearms Act.

On Exemption from the provisions of Section 23 of the Firearms Act.

36. Both the Applicant and Respondent submitted on the application of section 23 of the Firearms Act. The said section states as follows:

“(1) Any person aggrieved by a refusal of a licensing officer to grant him a firearm certificate under section 5 or to vary or renew a firearm certificate, or by the revocation of a firearm certificate, or by a refusal of a licensing officer to grant him a permit under subsection (12) of section 7, or by the revocation of such a permit, or by a refusal of a licensing officer to grant him a permit under subsection (13) of section 7 or to renew such a permit, or by the revocation of such a permit, or by the refusal of a licensing officer to register him as a firearms dealer, or by the removal of his name from the register of firearms dealers by a licensing officer, or by the refusal of a licensing officer to enter a place of business in the register of firearms dealers under section 15 or by the removal of any such place of business from the register, may appeal to the Minister, whose decision shall be final.

(2) An appeal under this section shall be lodged within fourteen days after the date on which the appellant first received notice, whether written or oral, of the decision by which he is aggrieved.

(3) On an appeal under this section, the Minister may either dismiss the appeal or give such directions as he may think fit to the licensing officer from whose decision the appeal has been lodged, as respects the firearm certificate, permit or register which is the subject of the appeal.”

37. The Respondent also relied on section 9(2) and (3) of the Fair Administrative Action Act to argue for the application of the provisions of section 23 of the Firearms Act, while the Applicant cited section 9(4) of the Fair Administrative Action Act to urge for his exemption from the said provisions. The provisions of section 9(2) (3) and (4) of the Fair Administrative Action Act were set out hereinabove in this ruling.

38. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (supra)** in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

39. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm

brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

40. However, the Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstance under section 9(4) of the Fair Administrative Action Act. The exceptional circumstances arise where the alternative mechanisms would not serve the values enshrined in the Constitution or law, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons.

41. Thus, in the case of Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96, the African Commission of People and Human Rights held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

42. Likewise, the approach to be taken by the Courts when considering if an exception applies was addressed by the Court of Appeal in R vs National Environmental Management Authority (2011) eKLR as follows:

".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

43. The main exceptional circumstance raised by the Applicant in the instant application for exemption is the perceived bias by the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, as evidenced by various media reports and press statements issued by the said Cabinet Secretary and his office before the impugned decision was made. The Applicant in this regard annexed copies of the said media reports and press statements, which are not disputed by the Respondent. The absence or otherwise of bias is in this regard a legitimate concern when considering the question whether an alternative remedy is accessible and effective, as the Constitution in Article 50(1) on the right to a fair hearing expressly provides that a dispute is required to be resolved by an independent and impartial tribunal or body.

44. The applicable test 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, who is the relevant Minister in section 23 of the Firearms Act, may be biased. This Court explained the applicable law in Stanley Thiong'o Nduati vs Secretary, Firearms Licencing Board & another; Attorney General (Interested Party) [2020] eKLR, where similar circumstances as those in the instant application arose:

"A likelihood or apprehension of bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she will be biased. The test to be applied in determining whether there is a likelihood of bias was stated in Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge,[1995-1998] 1 EA 134 by Lakha, JA as follows: -

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

45. The evidence provided by the Applicant indicates that the Cabinet Secretary had already made certain decisions as regards civilian firearms holders and had already formed an opinion on the subject matter of the impugned decision in the present suit. While the Cabinet Secretary may have the power to give the directions evidenced in the press statements which ultimately affected the Applicant, it would be contrary to the requirements of a fair hearing and principles of natural justice for the Cabinet Secretary to thereafter sit in judgment over disputes arising from the subject matter of the same directions.

46. Arising from these reasons, it is my finding that the alternative mechanism of an appeal to the same Cabinet Secretary is not an effective and fair remedy for the Applicant in the instant suit, and the exception in section 9(4) of the Fair Administrative Action Act therefore applies.

The Disposition

47. In conclusion, the Respondent's Notice of Preliminary Objection dated 4th November 2020 is found to have no merit, while the Applicant Notice of Motion dated 13th November 2020 is found to be merited and is allowed. As the Applicant filed his application for exemption after

a Preliminary Objection had already been raised on the issue, the Respondent will not be condemned to pay any costs for the application. Lastly, it is also necessary to address the pending prayers for temporary orders of stay sought by the Applicant at this stage, so as to expeditiously proceed with the hearing of the substantive application.

48. I accordingly direct and order as follows:

- I. The Respondent's Notice of Preliminary Objection dated 4th November 2020 is hereby dismissed with no order as to costs.
- II. The Applicant is hereby exempted from the alternative dispute resolution provisions of section 23 of the Firearms Act 2012 requiring that an appeal from the Respondent's decision revoking the Applicant's firearm dealers' registration/certificate No GD15 contained in the letter dated 8th October 2020 be made to the Minister.
- III. There shall be no order as to the costs of the Applicant's Notice of Motion dated 13th November 2020.
- IV. The Respondent shall file and serve its response to the Applicants' Originating Notice of Motion dated 16th October 2020 within fourteen (14) days of today's date.
- V. The Applicant shall thereafter file and serve his submissions on the Originating Notice of Motion dated 16th October 2020 within fourteen (14) days of service of the Respondent's response, or upon default thereof.
- VI. The Respondent is granted corresponding leave to file and serve its reply submissions within fourteen (14) days of service of the Applicant's submissions.
- VII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.
- VIII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.
- IX. A virtual hearing of the Applicant's Originating Notice of Motion dated 16th October 2020 shall be held on 19th July 2021 at 3 p.m., and the Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on that date.
- X. In the meantime, a temporary order staying the implementation of the Respondent's decision to revoke the Applicant's firearm dealers' registration/certificate No GD15 is hereby granted, pending the hearing and determination of the Applicant's Originating Notice of Motion application dated 16th October 2020, or until further orders of this Court.
- XI. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the Applicant and Respondent by electronic mail by close of business on Monday, 31st May 2021.
- XII. Parties shall be at liberty to apply.

49. Orders accordingly.

DATED AND SIGNED THIS 25TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this ruling will be delivered electronically by transmission to the email addresses of the Applicant's and Respondent's Advocates on record.

P. NYAMWEYA

JUDGE