



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
  
***(Coram: A.C. Mrima J.)***  
  
**CONSTITUTIONAL PETITION NO. E069 OF 2021**

**HON. DIDMUS BARASA.....PETITIONER**

**VERSUS**

- 1. INSPECTOR GENERAL OF POLICE**
- 2. FIREARMS LICENSING BOARD**
- 3. DIRECTOR OF CRIMINAL INVESTIGATION**
- 4. ATTORNEY GENERAL .....RESPONDENTS**

**RULING NO. 1**

1. The Petitioner herein, *Hon. Didmus Barasa*, is the Member of Parliament for Kimilili Constituency. He approached this Court with the Notice of Motion application (hereinafter '*the application*') dated 8<sup>th</sup> March, 2021 filed under certificate of urgency.
2. He sought to contest the press release dated 5<sup>th</sup> March, 2021, by the Chairman of the Firearms Licensing Board, the 2<sup>nd</sup> Respondent herein, revoking his firearm licence and directing that he surrenders his firearm certificate, all firearms and ammunitions to the 2<sup>nd</sup> Respondent within 24 hours of the said press release.
3. The application was supported by the Applicant's Affidavit sworn on 8<sup>th</sup> March, 2021. He deposed that the 2<sup>nd</sup> Respondent's press release did not give the grounds for revoking and requesting for the surrender of his licence and firearm in contravention of *Article 47(2)* of the Constitution.
4. It was his case that the press release was in violation of *Section 5(5)* of the *Firearms Act*, which accords every licenced firearm holder fourteen (14) days' notice for such surrender.
5. The Applicant deposed further that the he had not misused or involved himself in any misconduct as to warrant revocation and withdrawal of his licence and firearm respectively.
6. The Petitioner challenged the 2<sup>nd</sup> Respondent's decision as being *ultra-vires* since *Section 7* and *33* of the *Firearms Act*, quoted in the press release, do not empower the 2<sup>nd</sup> Respondent to revoke a firearm licence or direct the surrender a firearm.
7. Contemporaneously filed with the application was the Petitioner's main Petition dated 8<sup>th</sup> March, 2021, supported by his Affidavit sworn on the said date.
8. The Petition elaborated the factual background of the dispute. It also laid out the various provisions of the *Fair Administrative Act, 2015*, *The Firearms Act*, and *The Constitution* breached by the 2<sup>nd</sup> Respondent.
9. The application sought conservatory orders staying the decision of the 2<sup>nd</sup> Respondent revoking his firearm licence and firearm pending the hearing and determination of the application and the main Petition. If further sought temporary injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup>

Respondent from interfering with the Applicant's possession of licenced firearm.

10. The Petition on the other hand prayed for declaration among others that, the directive by the 2<sup>nd</sup> Respondent violated his constitutional right under *Articles 10,19,20,27, 29(d), 38, 47, 50, 73 and 232* of the Constitution, a declaration that the 2<sup>nd</sup> Respondents decision was arbitrary, a declaration that acts of commission and omission of the Respondents violated *section 3 and 4(3)(b) of the Fair Administration Act, section 5(5), (7), (8) and 33 of the Firearms Act*, an order of certiorari quashing the decision of the 2<sup>nd</sup> Respondent and an Order of prohibition restraining the 2<sup>nd</sup> respondent from directing the 2<sup>nd</sup> Respondent to revoke the Petitioner's firearm licence and calling for the surrender of his firearm.

11. On 8<sup>th</sup> March 2021, this Court issued conservatory orders staying the decision of the 2<sup>nd</sup> Respondent for 14 days. The orders were later extended to the hearing and determination of the application and the Petition.

12. In opposition to both the application and the Petition, the Respondents herein, filed a Notice of Preliminary Objection dated 30<sup>th</sup> March, 2021, on the following grounds: -

*1. THAT the Honourable Court lacks jurisdiction to hear and determine the Notice of Motion Application and the Petition dated 8<sup>th</sup> March, 2021.*

*2. THAT the application offends the provisions of section 9 (2) of the Fair Administrative Action Act. Further the application and the Petition dated 8<sup>th</sup> March, 2021 offends section 23 of the Firearms Act.*

*3. THAT Section 23 of the Firearms Act provides 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.*

*4. THAT in the matter of the Speaker of the National Assembly James Njenga Karume [1992] eKLR. Where the High Court held that;*

*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.*

*5. THAT the Notice of Motion Application and the Petition herein offends the doctrine of exhaustion of statutory provided remedies. This was held in the matter of Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others, where it stated that:*

*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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.*

*6. THAT the Notice of Motion application and the Petition herein is an abuse of the Court Process.*

13. The Court subsequently gave directions that the objection be first heard and determined. This ruling is, therefore, on the Notice of Preliminary Objection dated 30<sup>th</sup> March, 2021.

14. The Respondents relied wholly on the objection as drafted and filed. The Petitioner filed submissions on the objection.

15. I have carefully considered the objection and the submissions as well as the decisions referred to. I find that the following two main issues arise for determination: -

- i. *Whether the Preliminary Objection is proper in law.*
- ii. *Depending on (i) above, whether the Preliminary Objection is merited.*

16. I will begin with the first issue.

17.

18. As a general principle of law, preliminary objection is considered only if it raises pure points of law. In instances where it contains factual issues requiring the calling of evidence, it fails the test and in such scenarios is dismissed.

19. In ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd***, (1969) E.A 696 pg. 700 the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

*...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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.*

20. Similarly, in Civil Suit No. 85 of 1992, ***Oraro -vs- Mbaja*** [2005] 1 KLR 141, Ojwang J, as he then was, added his voice to the finding in ***Mukisa Biscuit -vs- West End Distributors*** case (supra) regarding the nature of preliminary objections when he observed as follows: -

... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. 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.

21. The High Court in ***John Musakali vs. Speaker County of Bungoma & 4 others*** (2015) eKLR held as follows: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

22. In making an assessment of the propriety of a preliminary objection, the Court in ***Omondi -vs- National Bank of Kenya Ltd & Others*** {2001} KLR 579; [2001] 1 EA 177, made the following important remarks: -

*....In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.*

23. A look at the objection reveals that it challenges the jurisdiction of this Court on the basis of the exhaustion doctrine.

24. As to whether a jurisdictional point is a pure point of law, the Supreme Court of Kenya in Petition No. 7 of 2013 ***Mary Wambui Munene -vs- Peter Gichuki Kingara and Six Others***, [2014] eKLR, held that 'jurisdiction is a pure question of law'. The Court also observed that a challenge on jurisdiction ought to be resolved on a priority basis.

25. Earlier on, the Apex Court in Constitutional Application No. 2 of 2011, ***In the Matter of Interim Independent Electoral Commission*** (2011) eKLR addressed the question regarding the source of a Court's jurisdiction as follows: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent....

26. The foregoing position was buttressed the same Court in ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others*** (2012) eKLR, when the Learned Judges observed as follows: -

*... A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether*

a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

27. The foregoing, hence, settles the fact that jurisdiction is a pure question of law.

28. It is, therefore, the finding of this Court that the objection raises a pure point of law capable of disposing of the entire Petition if successful. The objection passes the proprietary test and is for consideration.

29.

30. On whether the objection is merited, the Petitioner submitted that whereas *Section 23* of the Firearms Act provides the manner through which decisions of the Firearms Licencing Officer are challenged, the said provision neither fetters the jurisdiction of this Court to determine questions of violation of rights and fundamental freedoms under *Article 165(3)(b)* of the Constitution nor the jurisdiction to review the legality, propriety and procedural fairness of decisions under *Articles 165(3)(d)(1)* and *165(6)* of the Constitution.

31. It was urged that the wording of *section 23* of the Firearms Act referring appeals to the Minister is not in mandatory terms. The provision “*may appeal to the minister whose decision shall be final*” is merely directory.

32. The Petitioner further submitted that the exhaustion doctrine relied upon by the Respondents does not provide an absolute blanket bar to suits brought without going through the statutory procedure for redress of grievances.

33. It was submitted that pursuant to *section 9(4)* of the *Fair Administrative Action Act, 2015* and the decision of this Court in **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 others** [2017] eKLR, the Petitioner’s case fell within exceptional circumstances that warrant the bypassing of the statutory remedies.

34. The Petitioner sought to demonstrate exceptional circumstance by placing reliance on **Republic -vs- Firearms Licensing Board & Another Ex parte Boniface Mwaura** [2019] eKLR where the following factors to be considered by Courts were laid out: -

50. Factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.”

53. Second, ...a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, 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.

54. Third, the language of the provision ousting the court’s jurisdiction must be clear and unambiguous. In construing a statutory provision, the first and the foremost rule of construction is that of literal construction... If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid...

57. Fourth, this is a case where the Cabinet Secretary publicly made public utterances prior and after the impugned decision was made. The utterances were thinly veiled direct attacks to persons associated with either directly or indirectly with the opposition. The utterances leave any reasonable observer with no doubt that the Cabinet Secretary had either a fixed mind or was hostile to the said class of citizens... This is the same Cabinet Secretary who is required to hear the appeal...

61. The utterances attributed to Cabinet Secretary directed at persons in the opposition or directly associated with them manifest absence of impartiality and a ground for reasonable apprehension of bias. It is my conclusion that it would have been a futile exercise for the ex parte applicant to opt for an appeal before the same Minister. I also find and hold that reasonable apprehension of bias is a sufficient ground to satisfy the exemption requirement of exhausting the mechanism provided under *section 23* of the act.

35. The Petitioner contended that this Court has the jurisdiction on the basis that the Petitioner’s right to equality and freedom from discrimination, human dignity, security, political rights and the right to fair trial had been infringed upon.

36. The extreme ends of the divide as regards this Court’s jurisdiction is that, whereas the Petitioner claims jurisdiction under *Article 165(3)* of the Constitution for violation of various constitutional rights, the Respondents claims that the Petitioner’s grievance ought to have been resolved through the mechanisms provided for in the *Firearms Act*.

37. The resolution of the rival positions hinge on the provisions of *section 23* of the Firearms Act and the question whether the said provision, considered against the circumstances of the dispute, fall within exceptions necessitating direct access to Court.

38. Before resolving the issue at hand, it is first imperative to look at the body charged with the mandate of licensing and issuing firearms. It is the Firearms Licencing Board (hereinafter ‘**the Board**’)

39. Section 3 of the Firearms Act, Cap. 114 of the Laws of Kenya establishes the Board. The board comprises of the following: -

(2) The Board shall be appointed by the Cabinet Secretary and shall consist of a Chairman and—

- (a) two representatives from the National Police Service one of whom shall be from the Directorate of Criminal Investigation;
- (b) one representative from the Office of the Attorney-General;
- (c) one representative from a private members group of lawfully registered gun owners;
- (d) one representative from the Kenya Wildlife Service;
- (e) one representative from the National Intelligence Service; and
- (f) one representative from the National Focal Point.

40. The functions of the Board are set out in section 3(5) as follows;

(5) The functions of the Board shall be to—

- (a) certify suitability of applicants and periodically assess proficiency of firearms holders;
- (b) issue, cancel, terminate or vary any licence or permit issued under this Act;
- (c) register civilian firearm holders, dealers and manufacturers of firearms under this Act;
- (d) register, supervise, and control all shooting ranges that are registered under this Act;
- (e) establish, maintain and monitor a centralized record management system under this Act;
- (f) perform such other functions as the Cabinet Secretary may prescribe from time to time.

41. Section 5(5) of the Firearms Act of the sets out the process for the revocation of firearm licences. It provides as follows: -

(5) A licensing officer may at any time by notice in writing vary the conditions subject to which a firearm certificate is held, except such of them as may be prescribed, and may by the notice require the holder to deliver up the firearm certificate to him within fourteen days from the date of the notice for the purpose of amending the conditions specified therein.

42. Section 5(7) of the Firearms Act sets out the regulation for the revocation of firearm licences. It provides;

(7) A firearm certificate may be revoked by a licensing officer if—

- (a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfit to be entrusted with a firearm; or
- (b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate.

43. A party against whom a decision to grant or revoke a firearm licence is made may for one reason or the other be dissatisfied with such a decision or part thereof. Such a party has a recourse to Section 23 of the Firearms Act. The provision states: -

*Appeals under this Part*

(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.

44. I will now deal with the exhaustion doctrine. This Court recently discussed the exhaustion doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:

52. *The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:*

42. *This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated 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.*

43. *While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*

*This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:*

*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.*

45. The Court also 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 R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), 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.*

46. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 **Kenya Ports Authority v William Odhiambo Ramogi & 8 others** [2019] eKLR held as follows: -

*The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.*

*At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.*

47. Further, in Civil Appeal 158 of 2017, **Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

*23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.*

48. I have carefully considered the nature of the Petitioner's interests. It revolves around his personal security and the attendant need to have a firearm by virtue of the position he holds.

49. There is no doubt that the Board and the Cabinet Secretary while discharging their respective mandates must comply with the Constitution and the law. Article 10 of the Constitution is such a clear call.

50. Under Section 23 of the Firearms Act, any party aggrieved by the decision to revoke a firearm licence may appeal to the Cabinet Secretary. Therefore, on the basis of the Constitution and the law, the Cabinet Secretary has the jurisdiction to express itself on whether a decision of the Board or licensing officer which is appealed against ought to stand or not.

51. In this case, it may appear like once the decision to revoke the firearm licence is dealt with then the whole matter will stand resolved. However, there seems to be a difficulty. The discomfort is in respect to the remedies sought by the Petitioner. One of such remedies is a prayer for compensatory general damages in the event the Petition is successful.

52. A look at the Firearms Act and the law in general does not support the position that the Cabinet Secretary has the powers to assess and award compensatory damages for infringement of rights and fundamental freedoms. As such, the appellate forum provided under Section 23 of the Firearms Act will not sufficiently address the Petitioner's quest for justice in the event the Petition succeeds. (See the Court of Appeal in Nairobi Civil Appeal 213 of 2014 **Lucas Omoto Wamari -vs- Attorney General & another** [2017] eKLR).

53. As a result of the said inadequacy of the litigation forum in the event the Petition succeeds, this case, therefore, falls within the exceptions to the exhaustion doctrine. In other words, the doctrine of exhaustion does not apply in the circumstances of this case and as such this Court has the jurisdiction to deal with the matter further.

54. Having so found, this Court shall issue directions towards an expedited determination of the matter.

55. In the end, the following final orders do hereby issue: -

**(a) The Notice of Preliminary Objection dated 30<sup>th</sup> April, 2021 is hereby dismissed. Costs in cause.**

**(b) The parties shall comply with the directions made on 15<sup>th</sup> March, 2021 on the joint hearing of the Petition and the application.**

**(c) Highlighting of submissions on the Petition and the application on a date to be fixed by the Court.**

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021**

**A. C. MRIMA**

**JUDGE**

**RULING NO. 1 VIRTUALLY DELIVERED IN THE PRESENCE OF:**

**MR. KIPLANGAT, COUNSEL FOR THE PETITIONER.**

**MR. MARWA, COUNSEL FOR THE RESPONDENTS.**

ELIZABETH WANJOHI – COURT ASSISTANT