



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
MILIMANI LAW COURTS

MISC. APPLICATION NO. 202 OF 2019

STEPHEN VINCENT JOBLING.....PETITIONER

VERSUS

FIREARMS LICENSING BOARD.....1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR & COOPERATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

NATIONAL ASSEMBLY.....4TH RESPONDENT

AND

NATIONAL ASSOCIATION OF GUN OWNERS.....INTERESTED PARTY

RULING

1. This ruling is in respect of Further Grounds of Opposition filed by the Attorney General on 10th July, 2019 on behalf of the Firearms Licensing Board (1st Respondent), the Cabinet Secretary for Interior and Co-ordination of National Government (2nd Respondent) and the Inspector General of Police (3rd Respondent). Through the said pleading the 1st to 3rd respondents seek the termination of the Petitioner's notice of motion and petition dated 28th May, 2019 on the grounds:-

“1. THAT the matter is now *res judicata* having been determined by the HIGH COURT OF KENYA AT NAIROBI IN JUDICIAL REVIEW APPLICATION NO. 65 OF 2019 STEPHEN VINCENT JOBLING VERSUS FIREARMS LICENSING BOARD AND ANOTHER ON 8th July 2019 as such the same should be struck out.

2. THAT a Court of competent Jurisdiction has already pronounce itself on this very matter in the sense that the Petitioner/Applicant's suit offends the doctrine of exhaustion of statutory provided remedies.

3. THAT on account of ground 2 above, the Notice of Motion Application and the Petition dated 28th May, 2019 have been prematurely instituted as provided for under sections 9(2)(3) and (4) of the Fair Administrative Action Act, 2015.

4. THAT the Application and the Petition dated 28th May 2019 offends the provisions of section 23 of the Firearms Act.

5. THAT this Honourable Court should invoke the constitutional avoidance doctrine and decline to hear this Petition and Notice of Motion Application.

6. THAT both the Application and Petition are an abuse of the process of this Honourable Court.”

2. The Petitioner, Stephen Vincent Jobling, and the Interested Party, National Association of Gun Owners, opposed the 1st-3rd respondents'

attempt to strike out the petition. The 4th Respondent, the National Assembly, has so far not participated in the proceedings.

3. The 1st to 3rd respondents' claim that this petition is *res judicata* goes to the jurisdiction of this Court and the issue must be dealt with forthwith—see **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**.

4. The doctrine of *res judicata* was explained by the Vice Chancellor Sir James Wigran in **Henderson v Henderson [1843] 3 Hare 100** as follows:-

“[W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. the plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

5. In order for a party to successfully invoke the doctrine of *res judicata* it must be established that the suit or issue was directly and substantially in issue in a former suit; that the former suit was between the same parties or their surrogates; and that the issue was heard and finally determined in the other matter by a court of competent jurisdiction—see the Court of Appeal case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR; Civil Appeal No. 105 of 2017 (Nairobi)**.

6. The purpose of the *res judicata* doctrine was explained by the Court of Appeal in **Maina Kiai (supra)** thus:-

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

7. The fact that the Petitioner's application in **Republic v Firearms Licensing Board & another Ex-parte Stephen Vincent Jobling [2019] eKLR; Nairobi High Court Judicial Review Application No. 65 of 2019** was dismissed for failure by the Petitioner to exhaust the available dispute resolution mechanism is not in dispute.

8. The Petitioner appears to suggest that the dismissal was not based on consideration of the issues on merit. In support of this position the Petitioner's counsel has urged this court to rely on the decisions in the cases of **Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another [2018] eKLR; State of Maharashtra and another v National Construction Company Bombay, Supreme Court Civil Appeal No. 1497 of 1996; M. W. K. v A. M. W. [2016] eKLR; and Centre for Rights and Awareness & 2 others v Speaker of the National Assembly & 6 others [2017] eKLR**.

9. Counsel for the Petitioner further urged this court that the petition is not *res judicata* because a judicial review application deals only with the matters of procedure and not the merits of the case whereas a constitutional petition deals with the interpretation of the Constitution and the court can make specific declarations where fundamental rights and freedoms have been breached or are about to be breached.

10. According to counsel for the Petitioner, the judgment in the Judicial Review matter did not determine the issues on merits since the Court only advised that the Petitioner ought to have exhausted the alternative dispute resolution mechanism before approaching the Court.

11. On his part, counsel for the Interested party, while supporting the Petitioner's position submitted that the petition does not meet the *res judicata* test as set down by the Court of Appeal in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**.

12. According to the Interested Party's counsel, the Judicial Review application and this case are distinguishable for the reasons that the Judicial Review case involved issues of procedural fairness of a given decision affecting the applicant therein, while this petition involves matters of grave constitutional concern and the validity of legislation; that the parties in the Judicial Review application were the Petitioner, the 1st Respondent and the 2nd Respondent while the present petition also involves the Interested Party and the 3rd and 4th respondents; and that the Judicial Review case was not determined to its finality, as the application for leave was dismissed only on the basis of non-exhaustion of the mechanism under the Firearms Act and the Court did not therefore determine the substance of the matter on merit. Counsel relied on the decisions in **Margaret Wanjiru Kiiru v Susan Wakarura Kihika & another [2018] eKLR** and **Republic v Independent Electoral and Boundaries Commission (I.E.B.C) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**.

13. A perusal of the submissions of the parties confirm that I am only required to apply the law to the facts of the case. Were the parties in the Judicial Review application the same with the parties in this case? The answer is in the negative. Does that then defeat the application of the *res judicata* principle to this petition? The answer is once again in the negative. The dissimilarity of the parties does not necessarily defeat does not defeat the *res judicata* principle. In **George W. M. Omondi & another v National Bank of Kenya & 2 others [2001] EA 177; [2001] eKLR**, the Court cautioned that **“parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.”** It is the Petitioner who added the Inspector General of Police, the National Assembly and the National Association of Gun Owners to this petition. He cannot now turn around and say this matter is not *res judicata* because new parties have come

on board. I therefore find that the naming of additional respondents and the Interested Party in the petition cannot defeat the doctrine of *res judicata*.

14. Are the issues in the two matters similar? Were the issues in the judicial review application determined on merit? At paragraph 4 of his ruling dated 8th July, 2019 in **Republic v Firearms Licensing Board & another Ex-parte Stephen Vincent Jobling [2018] eKLR**, John M. Mativo, J identified the prayers that were being sought in the application for leave to commence judicial review proceedings as follows:-

“a. Spent.

b. Leave be granted to the applicant to apply for an order of certiorari, to call to this honourable court, and quash the decision of the 1st Respondent communicated in the 1st Respondent’s receipt form dated 7th March 2019 purporting to revoke his Civilian Firearm Certificate No. 003966 formerly 9032 issued on 17th December 2019, entitling him to bear the following firearms:-

i. Rifle 223 (S/No. 3071729)

ii. Shot Gun (S/N 12Y01110)

iii. Glock (S/N UAN 742)

iv. Glock (S/No. Sss261)

c. Leave be granted to the applicant to apply for an order of mandamus to compel the 1st Respondent to issue the applicant with Civilian Firearms Licence and the Firearms Rifle 223 (S/No. 3071729); Shot Gun (SN 12Y01110); Glock (S/N UAN 742); Glock (S/No. Sss261).

d. Leave be granted to the applicant to apply for an order of prohibition to prohibit the Respondents, their servants, agents, employees and or any other persons(s) acting pursuant or purporting to act on their instructions from withdrawing the Firearm License duly issued to the applicant without any basis in law.

e. That the grant of leave to institute proceedings as aforesaid to operate as a stay of the purported revocation of the applicant’s Civilian Firearm Certificate Number 003966 in terms communicated in the 1st Respondent’s receipt form dated 7th March 2019 and any interference of the liberty and movement of the applicant pursuant to the purported public announcement. That the Respondents be ordered to reinstate all the certificate and return the applicants firearm book, identity card, all firearms, magazines stated herein forthwith.

f. A declaration that the Press Release issued on 31st January 2019 is unconstitutional, illegal, invalid and has no legal effect.

g. Costs of this application be awarded to the applicant.”

15. In the application by way of notice of motion filed herein on 29th May, 2019 the Petitioner prays for orders that:-

“a. This Honourable Court be pleased to certify this application as extremely urgent and do dispense with service of the same and proceed to hear the application ex-parte in the first instance.

b. This Honourable Court be pleased to grant a temporary order for an injunction suspending Section 3 of the Firearms Act pending the hearing and determination of this application and the Petition herein.

c. This Honourable Court be pleased to grant a temporary injunction suspending the vetting or verification exercise by the Respondents pending the hearing and determination of this Application and the Petition herein.

d. This Honourable Court be pleased to grant a temporary order for injunction suspending the 1st Respondent’s purported issuance, cancellation, suspension or termination of firearm dealerships and civilian firearm holders of the 1st Respondent pending the hearing and determination of this Application and the Petition herein.

e. This Honourable Court be pleased to grant a temporary conservatory order against the announcement of the 1st Respondent and the directive of the 2nd Respondent through the press release purporting to suspend/revoke all civilian firearm licenses including the Petitioner’s CIVILIAN FIREARM LICENSE NUMBER 003966 and confiscate and illegally posses firearms and ammunition, pending the hearing and determination of this Application and the Petition herein.

f. This Honourable Court be pleased to grant a temporary order against 1st Respondent to return the Civilian Firearm License Number 003966 and all firearms and ammunition, held under that license (RIFLE 223 – S/NO. 3071729; SHOT GUN – S/NO.12Y1110; GLOCK – S/N UAN 742; GLOCK S/NO. Sss261), to the 2nd Respondent within 24 hours pending the hearing and determination of this Petition.

g. This Honourable Court be pleased to grant a temporary order for injunction restraining the Respondents whether directly and/or through their agents, servants and/or employees and any person or body from harassing, intimidating and/or threatening the Petitioner or any civilian firearm license holder or dealer in any manner pending the determination of this Petition.

h. This Honourable Court be pleased to grant a temporary order of injunction against the Respondents, directly or indirectly through their agents, servants, employees or any other governments agency and any person or body, from issuing any illegal directives purporting to suspend or revoke civilian firearm licenses or confiscate and illegally retain firearms and ammunition, pending the hearing and determination of this Application and Petition.

i. Costs of this Application be provided for.”

16. The prayers sought in the petition filed together with the said application are:-

“A. A DECLARATION be and is hereby issued that:

i. Sections 3, 4, 4a, 6, 23, 26, 27, 28, 35, 39 and 45 of the Firearms Act and any subsidiary instrument enacted thereunder or administrative action undertaken thereunder are unconstitutional as contravening provisions of Articles 1, 10, 238, 239 and 247 of the Constitution and are thus declared null and void and of no effect.

ii. The Press Release issued by the 1st Respondent following the announcement of 2nd Respondent without public participation and without basing themselves on any legal provisions under the law and the Revocation of the Petitioner’s Civilian Gun License is contrary to the Constitution, the Firearms Act and against his Rights and fundamental freedoms enshrined in the Constitution.

iii. The actions and the decision of the 2nd Respondents and their agents of revocation of his license, and guns without reasonable explanation amounts to an infringement of his Rights to own property under Article 40 of the Constitution, threatens his right to security under Article 29, breach of Public Trust and Right to a fair administrative action.

iv. The actions of the 2nd Respondent of withdrawing the Petitioner’s CIVILIAN FIREARM CERTIFICATE NUMBER 003966 allowing the Petitioner to possess RIFLE .223 (S/No. 3071729; SHOT GUN (S/N 12Y1110); GLOCK (S/N UAN 742); GLOCK (S/NO Sss261) without any lawful justification is contrary to the Petitioner’s right to Property and Security under Articles 29 and 40 of the Constitution and therefore unconstitutional.

v. All the acts by the Respondents and their agents of harassment, intimidation against the Petitioner by the Respondents amount to an infringement of the Petitioner’s Constitutional rights as enshrined in the Bill of Rights and are therefore unconstitutional and the intended and/or threatened arrest and detention of the Petitioners by the officers and/or agents of the 1st and 2nd Respondents is unconstitutional, unlawful and a violation of the fundamental rights of the Petitioners as enshrined in Articles 28, 29 and 47 of the Constitution.

vi. All the acts against the Petitioner by the Respondents are unfair, unreasonable, irrational, illegal and the decision has been taken or made in abuse of power and *mala fides* in contravention of Articles 47 of the Constitution and Sections 4, 5 and 7 of the Fair Administrative Action Act and therefore unconstitutional.

B. A PERMANENT INJUNCTION be and is hereby issued;

i. Terminating the operation and/or implementation of the Security Law (Amendment) Act, 2014 amending Sections 3 and 35 of the Firearms Act and declaring all actions taken thereunder including, purported cancellation, termination, suspension or otherwise of duly issued dealership licenses and civilian firearms holders licenses as invalid and of no effect.

ii. Terminating the establishment and operation of the 1st Respondent outside the command of the Inspector General for being unconstitutional.

iii. Restraining the Respondents directly or indirectly through their agents, servants, employees or any other governmental agency and any person or body from issuing any illegal directives purporting to suspend or revoke civilian firearm licenses or confiscate and illegally withhold legally held firearms and ammunition.

iv. Restraining the Respondents, whether by themselves, their agents, privies and servants, acting for and on their behalf whether jointly or severally from harassing, in any manner whatsoever intimidating and/or interfering with the Petitioner’s fundamental rights and freedoms in respect of the right to own and hold property and security as fundamental rights guaranteed by the Constitution.

C. A MANDATORY ORDER be and is hereby issued:

i. Directing the 1st Respondent herein to restore and/or reinstate the Petitioner’s CIVILIAN FIREARM CERTIFICATE NUMBER 003966 allowing the Petitioner to possess RIFLE 223(S/NO. 3071729); SHOT GUN (S/N

12Y01110); GLOCK (S/N UAN 742); GLOCK (S/NO. Sss261).

ii. Directing the 1st Respondent herein to return the Civilian Firearm License Number 003966 and all firearms held under that license (RIFLE 223-S/NO 3071729; SHOT GUN-S/N 12Y01110; GLOCK-S/N UAN 742); GLOCK-S/NO. Sss261) to the Petitioner.

iii. Terminating the directives issued by the 2nd Respondent purporting to cancel, suspend, terminate or otherwise vary dealership licenses and civilian firearm holders' certificates.

iv. Directing the National Assembly to undertake a review of the Firearms Act to ensure its conformity with the Constitution, in particular, Articles 238, 239, 244, 245 and 247 of the Constitution.

D. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.”

17. A perusal of the pleadings herein and the application for leave to commence judicial review proceedings in the Judicial Review case will clearly show that the majority of prayers sought in this matter were sought in the Judicial Review case. The majority of the issues in litigation in the Judicial Review case are the same issues the Petitioner intends to pursue in these proceedings.

18. The question therefore is whether the issues in the Judicial Review matter were heard and determined on merit. I agree with the advocates for the Petitioner and the Interested Party that a matter that has not been heard and determined on merits cannot be said to be *res judicata*. I, however, part ways with them when they try to convince me that I can reopen the issues in the Judicial Review application. In holding that the Petitioner, who was the applicant in the judicial review matter, had not exhausted the alternative dispute resolution mechanism, John M. Mativo, J was simply telling the Petitioner that he had no jurisdiction to entertain his matter at that point in time. I cannot now turn around and claim to have jurisdiction over the same issue. Doing so would amount to sitting as an appellate court over the decisions of a court of coordinate jurisdiction.

19. The finding by my brother on the issue of jurisdiction remains undisturbed unless dislodged by an appeal or an application for review. A competent court determined that this Court, meaning the High Court, has no jurisdiction to hear the Petitioner's case. The Petitioner cannot clothe this court with jurisdiction by converting his case from a judicial review application to a constitutional petition. He was required to place all the issues concerning his complaint before the Judicial Review Judge.

20. In **E. T. v Attorney General & another [2012] eKLR**, Majanja, J cautioned, and I agree with him, that:-

“The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

21. An originator of a case selects the procedure to use in litigating his/her case. The Petitioner cannot be allowed to reinvent his Judicial Review application as a constitutional petition in order to avoid the application of the doctrine of *res judicata* to his circumstances. The bottom line is that the foundation of his petition is the decision to take away his firearms licences. That is the decision he intended to challenge when he sought leave in the Judicial Review application. He ought to have pleaded everything touching on that issue in the judicial review case. Failure to do so attracts the application of the *res judicata* the application of *res judicata* doctrine to any attempt to re-open the matter.

22. I am indeed aware, as was stated in **John Florence Maritime Services Limited** (supra), the doctrine of *res judicata* “**should only be invoked in constitutional litigation in the clearest of the cases**” and that it “**must be sparingly invoked and the reasons are obvious as rights keep evolving, mutating, and assuming multifaceted dimensions.**”

23. I have considered the facts of this case and even with the warning in the cited case in mind, I nevertheless reach the conclusion that the facts have not changed from the time the Judicial Review application was struck out to warrant the exclusion of the application of the **res judicata** principle to this matter. The Court of Appeal was firm in the just cited case of **John Florence Maritime Services Limited** that:-

“We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*.”

24. In light of what I have stated above, it follows that the Petitioner's case is *res judicata*. His petition and application dated 28th May, 2019 are therefore struck out. Each party shall meet own costs of the proceedings.

Dated, Signed and Delivered at Nairobi this 19th day of December, 2019

W. Korir,

Judge of the High Court