REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 420 OF 2017

REPUBLIC.....APPLICANT

AND

FIREARMS LICENCING BOARD.....1ST RESPONDENT

DCIO KILIMANI POLICE DIVISION.....2ND RESPONDENT

POLICE SERVICE COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE: JULIUS OKEYO OWIDI

JUDGEMENT

Introduction

1. In his Notice of Motion dated 13th July, 2017, the ex parte applicant herein, **Julius Okeyo Owidi,** seeks the following orders:

> **1. An order of certiorari to move into this honourable court for the purpose of being quashed a decision of the 1st respondent to withhold the applicant's firearm licence No. 9686 and the applicant's pistol Taurus Model PT 92AF Serial No. TFU 72381;**
>
> **2. Mandamus to compel the respondents to return the firearm licence No. 9686 and Pistol Taurus Model PT 92AF Serial No. TFU 72381 to the applicant;**
>
> **3. Prohibition to prohibit the respondents from any interference whatsoever with the firearm licence No. 9686 and Pistol Taurus Model PT 92AF Serial No. TFU 72381.**

Ex Parte Applicant's Case

2. According to the ex parte applicant, he is a licenced firearm holder having been issued with certificate No. 9686 by the 1st respondent in October, 2014 and pursuant to the said certificate, he owned a Pistol Taurus Model PT 92AF, calibre 9mm serial No. TFU 72381.

3. The applicant averred that on the 16th August 2016 at dawn robbers broke into his compound while armed with crude weapons and stole his motor vehicle spare parts from the store. However before they left the applicant confronted them and a struggle ensued and as one of the robbers came from behind and hit him he shot once using his pistol because he feared for his life and wanted to protected himself. The ricocheting hit one of the robbers but all of them managed to escape.

4. It was averred by the applicant that after the incident, he reported the matter to the nearby Ayany Police Post and afterwards but after wards the matter was taken over by police officers from police post came and later police officers from Kilimani who took it over from the officers from Olympic police post. The officers from Kilimani police station however took the applicant's firearm licence and the firearm. Whereas the applicant spent a whole day at the police station and was only released in the evening, his licence and firearm were however not released to him.

5. The applicant averred that about six months after the incident he made a follow up to Kilimani police station to inquire as to why his firearm and licence had not been released to him but no explanation was given. Similarly his report of the matter to the 2nd respondent did not bear any fit despite making several visits to her office. He was however later informed that the 2nd respondent herein had handed the licence and the firearm to the 1st respondent herein.

6. The applicant averred that no charges pressed against him based on the incident of 16th August 2016 and he was not required to answer to any allegations of misuse of a firearm but the licence and the firearm remained withheld by the 1st respondent who refused to release them to him.

7. It was the applicant's complaint that despite having committed any offence the Respondents withheld his firearm and licence unjustifiably and on no grounds known to him. It was the applicant's case that the respondents did not observe the rules of natural justice in arriving at the said decision as they did it arbitrarily without him being given notice at all of the said withholding of the said firearm and licence; that no charges were brought against him so that he could put in his defence hence he feel that he was not given a fair hearing; and there was no communication made to him regarding the decision and the grounds on which they were withholding his firearm licence and the firearm.

8. The applicant further contended that no notice was issued to him informing him of the intention to cancel and or withhold his said licence and firearm which action was taken without involving and or informing him.

9. It was the applicant's case that the investigations carried out by the 2nd respondent after 16th August 2016 disclosed no offence against him to warrant a charge or allegation of misuse of the firearm hence no charges were pressed against him. To the applicant, the 1st and 2nd respondent acted in bad faith and with improper motive in their decisions as they acted without substantive fairness and without regard to the principles of fairness. In his view, he was treated as a perpetrator yet he was a victim of a robbery.

10. It was the applicant's case that the decision and actions made by the respondents are unreasonable considering the events that took place with regard to the whole incidence and that the respondents in their decision to withhold his firearm failed to consider the reasons as to why he had to get himself a firearm therefore endangering his life. The applicant lamented that the 1st and 2nd respondent in their decisions acted in bad faith as he was ill-treated in their offices and given no information concerning the status of his firearm and his firearm licence. It was the applicant's expectation that the office of the 2nd respondent would protect him as a victim of housebreaking and robbery but instead he was treated as a perpetrator.

11. Based on legal advice, the applicant believed that whereas courts of law in Kenya are very loath to interfere with decisions of domestic bodies and tribunals including commissions and state bodies they will however interfere to quash decisions of any bodies when they are moved to do so where it is manifest that the decisions have been made without fairly and justly hearing the person concerned or other side. Further it is the duty of the Court to curb excess of officials and bodies who exercise administrative measures and his case herein merits and calls for such intervention hence this application.

1st Respondent's Case.

12. The 1st Respondent Board was however opposed to the application.

13. According to the Board, pursuant to the provisions of the ***Firearms Act*** Cap 114 Laws of Kenya, it is bestowed with the powers of deliberating on the cases of licensing and use of firearms and that once an applicant submits an application for a firearm licence to the Board, he or she is usually vetted thoroughly. In the light of the foregoing, the Board then only issues the firearm licence upon receiving recommendations on the vetting and being fully satisfied that the applicant has sufficient reasons to warrant issuance of the licence and that the firearm licence once granted is subject to renewal annually and may be revoked anytime if satisfied inter alia the holder is unfit to hold and/or misuses the firearm.

14. It was averred that any incident involving firearm use and/or misuse of a firearm is usually reported by police officers in charge of security in the respective areas.

15. In this case it was deposed that the applicant herein had been licenced a firearm Certificate No. 9686 holder which was issued to him on 14th October, 2014 after successful application and through the said certificate he acquired a Pistol Taurus S/No.TFU 72381 with 50 rounds of ammunition from J.J. Okwaro & Co. who is a registered firearm dealer and as such, was subject to regulations of the ***Firearms Act*** and directions from the office of the inspector General of police.

16. It was averred that on 25th January, 2017, the firearms Licensing Board received a letter from Kilimani Divisional criminal Investigations Officer reporting a case of unlawful wounding contrary to section 237(A) of the ***Penal Code*** where the Applicant was accused of unlawfully wounding one **Collins Ochieng** on the 16th August, 2016 by shooting him on his left thigh and injuring **Peter Okoth Elijah** on the head using a piece of wood. From the report, it was averred that the injured were rushed to Spinal Injury Hospital where they were treated and discharged in a fair condition and a report was later made at Ayany Police Post vide OB 2 of 16th August, 2016 and they were issued with p3 forms having been dully filled by the Surgeon and the degree of injuries classified as harm.

17. The injured, it was averred, also recorded their statements with the police. According to the Board, in the light of the report and in the interest of preventing more harm to the public bearing in mind that the applicant was armed with a lethal weapon, the police officers disarmed the applicant forwarded it to the Board for directions and administrative action since the complainants withdrew the complaints from the police.

18. It was contended that the Firearms Licensing Board deliberated on the circumstances of the incident which led to the shooting, and found no satisfactory reason to warrant use of a lethal weapon in the incident and vide a letter dated 11th April,2017 it revoked the Applicants firearm license. According to the Board, it found that the said licensee appeared to have been driven by hostile emotions which strongly projected unfavourable state of mind and behaviour resulting to unnecessary use of a firearm as the two complainants had no weapons hence there was no reasonable cause to shoot at them. The Board was of the view that if at all the applicant's actions were called for and he felt aggrieved by the decision of the Board revoking the licence then he still has the right to appeal against the decision of the board to the Cabinet Secretary, which right he has chosen not to exercise hence cannot be heard to claim that the acts of the police were arbitrary.

19. In the Board's view, once a licence is revoked, the same ceases to exist and cannot be reinstated unless the applicant is heard by way of an appeal to the licensing board. It was therefore the Board's case that the Applicant's application is an abuse of the court process, bad in law and against the public interest and does not warrant judicial review remedies as the Applicant has no justiciable case against the Respondents thus ought to be dismissed with costs.

2nd and 3rd Respondents' Case

20. The application as opposed by the 2nd and 3rd Respondents.

21. According to the said Respondents, on the 16th day of August 2016, the applicant herein discharged his firearm and injured one **Collins Ochieng** age 21 years and assaulted one **Peter Okoth Elijah** aged 29 years who were working for National Youth Service project within Kibera Ayany. It was averred that the two, **Collins Ochieng** and **Peter Okoth Elijah** were on that day assigned to clear structures along the railway line that had been demolished.

22. Following the report of the said incident to the police at Ayany Police Post vide OB Number 2 of 16th August 2016, a police officer from the said Police Post visited the scene and found **Collins Ochieng** shot on the left thigh and **Peter Okoth Elijah** injured on the head and the two were rushed to the hospital for treatment.

23. It was disclosed that the applicant herein availed his firearm serial No. TFU 72381 make Taurus a magazine loaded with 14 rounds of 9mm and a firearm holder certificate No. 9686 in the names of **Julius Okeyo Owidi** which firearm was forwarded to the ballistic expert for examination and analysis and the investigations were completed and three charges were preferred against the applicant herein being unlawful wounding contrary to section 237(a) of the ***Penal Code***; Assault contrary to section 251 of the ***Penal Code***; and behaving disorderly while carrying a firearm contrary to section 33 of the ***Firearms Act*** Chapter 114 Laws of Kenya.

24. It was averred that the complainants were neither armed nor violent and the investigating officer after completing his investigations recommended that the firearm be returned to the central bureau for further directions. Accordingly, on the 11th day of November 2016, the applicant was summoned to the station and he came with the two complainants, **Collins Ochieng** and **Peter Okoth Elijah** who told the investigating officer that they are no longer interested in pursuing the case and the two withdrew the case from the police. Thereafter the applicant was referred to chief licensing officer, central firearms bureau to follow up his firearms. However the office of the DCIO Kilimani received a copy of a letter ref. FLB/SEC/2/113 dated 11th April 2017 confirming revocation of firearm certificate number 9686 from the applicant.

Determinations

25. I have considered the issues raised herein.

26. Section 5(7) of the ***Firearms Act***, Cap 114 of the Laws of Kenya 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 unfitted 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.*** [Underlining mine].

27. This Court has had occasion to deal with the word "satisfied" in **Republic vs. Kenya Forest Service Ex-parte Clement Kariuki & 2 Others [2013] eKLR,** where the Court held that the catchword in the above section is that the Board must be ***"satisfied"***. For the Board to be said to have been satisfied, it is my view that it must consider all the relevant factors.

28. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

> **"To consider" is to look at attentively or carefully, to think or deliberate on, to take into**

account, to attend to, to regard as, to think, hold the opinion..."Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."

29. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL.**

30. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

"The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution "in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property…The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law…It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts

before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, nolonger in occupation. It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

31. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

32. In this case the applicant's case is that no notice was issued to him informing him of the intention to cancel and or withhold his said licence and firearm which action was taken without involving and or informing him.

33. Article 47(1) and (2) of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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

34. Apart from that provision section 4(1), (2) and (3) of the ***Fair Administrative Action Act*** provides as follows:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where

applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

35. What the Constitution requires in my view is the notification of the intention to have the Certificate withdrawn and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant Certificate holder to be heard on the circumstances alleged to constitute satisfactory reasons for the withdrawal of the Certificate.

36. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, *the executive should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the executive is not one of the reasons upon which it is legally entitled to act, the Court is entitled to intervene since the action by the executive would then be based an irrelevant matter.*

37. In this case despite the applicant's contention that he was never afforded an opportunity of being heard, the Board has not even pretended that the applicant was accorded such an opportunity before the decision was made. Whereas the Board contended that it deliberated on the circumstances of the incident which led to the shooting, and found no satisfactory reason to warrant use of a lethal weapon in the incident and vide a letter dated 11th April,2017 it revoked the Applicants firearm license; however nobody knows what exactly were the circumstances of the incident that the Board deliberated upon since these circumstances were never disclosed. It defeats reason and fairness for the Board to have deliberated on the circumstances of the case in the absence of the applicant. Such a course of proceeding is not only a violation of the rules of natural justice but is also irrational.

38. It has been said time and again that a decision which is arbitrarily taken cannot stand the test of fairness. In the words of **Chaskalson, Woolman and Bishop** in ***Constitutional Law of South Africa,*** *Juta, 2nd ed. 2014, page 49*:

> **"Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."**

39. In this case, the Board seems to have adopted the erroneous view that the law empowers it to have absolute discretion when it comes to the revocation of firearm certificates. With due respect, to hold that a member of the executive is the sole judge when it comes to the exercise of discretion, it has been held, would be to throw the rule of law out of the window. When constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. See **Masalu and Others vs. Attorney General [2005] 2 EA 165.**

40. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

> **"When litigants come to the courts it is the core business of the courts and the courts' role is**

to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

41. The Board has however contended that because the certificate has already been cancelled the same cannot be reinstated. With due respect this is a misconception of the remedy of certiorari. As was held in **Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996[1997] eKLR**when it stated:

"Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

42. In other words an order of certiorari only issues where a decision has been made. In any case as was appreciated in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**:

"It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made...So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit…It therefore matters not whether the decision has been made or not, what matters is the objective for which the court procedures are being utilised…Where such a point is reached that the process is an abuse, it matters not whether it has commenced or whether there was acquiescence by all the parties. The duty of the court in such instances is to purge itself of such proceedings..."

43. It was further contended that the applicant ought to have appealed to the Minister. This contention was premised on sections 23 of the ***Firearms Act*** which provides that:

(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. An appeal usually interrogates the merits of the decision. Where a decision is simply made without any reasons, an appeal against such a decision may not be the most efficient means of challenging the decision.

45. In any case as was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."**

46. In my view before the applicant's Certificate could be withdrawn the 1st Respondent had to be satisfied that the provisions of section 5(7) of the Act were satisfied. It is not just enough to contend that the circumstances of the case were considered by the Board. The Board is under a duty to disclose what exactly it considered and give reasons for its decision. I associate myself with the decision in **South Bucks District Council & Another vs. Porter [2004] UKHL 33** to the effect that:

> **"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."**

47. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

> **"The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances**

prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…"

48. This requirement is now hinged on section 6(4) of the ***Fair Administrative Action Act*** which provides that:

> ***…if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.***

49. To my mind the factors which the Board purported to have taken into consideration ought to have been presented to the applicant and his version on the same heard before the decision to cancel his firearms certificate was made.

50. It is therefore clear that the manner in which the Board purported to have cancelled he Applicant's Firearms Certificate was tainted with procedural irregularity.

51. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, <u>including</u> an order***
>
> ***(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***
>
> ***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
>
> ***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
>
> ***(d) prohibiting the administrator from acting in a particular manner;***
>
> ***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
>
> ***(g) prohibiting the administrator from acting in a particular manner;***
>
> ***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(i) granting a temporary interdict or other temporary relief; or***
>
> ***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

52. Therefore this Court has the power to set aside the order canceling or revoking the applicant's firearms certificate and to give appropriate directions.

53. As a parting shot however, I wish to restate this Court's position in **<u>Bryan Yongo vs. Chief</u>**

Licencing Officer & 3 Others [2014] eKLR that:

> ***"…a firearm is not a toy. It is a very lethal weapon and as such ought not to be brandished anyhow as if it were a swagger stick or a flywhisk. Those who are privileged to be licensed to hold firearms must exercise utmost responsibility and must guard against careless use of the firearm. Therefore firearm licences ought to be granted only in situations where it is necessary to do so and where the strict conditions for its grant are fulfilled. A firearm in my view is not a symbol of power and ought not to be issued to those who simply want to use the same to intimidate other members of society or to throw their weights around. Where a grantee or licensee of firearm certificate abuses the privilege the same ought to be speedily withdrawn before the society is exposed to the perils and vagaries of firearm abuse."***

54. Before issuing a firearm certificate, it behoves the authorities concerned to follow the laid down procedure in order to ensure that such lethal weapons do not end up in the wrong hands. However after issuing the same, the presumption is that the laid down procedure was duly followed and the same can only subsequently be cancelled or its renewal denied in accordance with the due process of the law which in my view does not allow for shortcuts. This must be so, so that the decision to withdraw or decline the renewal of the certificate is not arbitrarily taken and used as a political weapon with a view to exposing to harm those whose views are deemed to be contrary to the system's or in order to settle personal scores.

55. When a country opts to follow the path the democracy it must be prepared not only to enjoy the fruits therefor but must also be prepared to pay the cost of doing so. As the Court of Appeal appreciated in **Judicial Commission of Inquiry Into the Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249**:

> **"Democracy is normally a messy, and often times, a very frustrating, way of governance. In this respect, dictatorships are more efficient."**

56. We have made a bed and we must lie on it however some people may feel uncomfortable with it. This is the message in Article 2(1) of the Constitution where it is provided that:

> ***This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***

57. In the premises I find merit in the Notice of Motion dated 13th July, 2017.

Order

58. Consequently and pursuant to section 11 of the ***Fair Administrative Action Act*** the orders which commend themselves to me and which I hereby grant are as follows:

> **1. An order of certiorari removing into this Court for the purpose of being quashed the decision of the 1st respondent to cancel or revoke the applicant's firearm licence No. 9686 and to withhold the applicant's pistol Taurus Model PT 92AF Serial No. TFU 72381, which decision is hereby quashed;**
>
> **2. Mandamus compelling the 1st Respondent Board to within 30 days of service of this order rehear the matter afresh while giving the applicant an opportunity of being heard and make its decision thereon in accordance with the law.**
>
> **3. In default of compliance with the said order an order of mandamus shall issue compelling the 1st respondent Board to return the firearm licence No. 9686 and Pistol Taurus Model PT 92AF Serial No. TFU 72381 to the applicant and a prohibition shall issue to prohibit the respondents from any interference whatsoever with the firearm licence No. 9686 and Pistol Taurus Model PT 92AF Serial No. TFU 72381 unless the due process is followed.**

4. In the circumstances of this case each party will bear own costs of these proceedings.

59. It is so ordered.

Dated at Nairobi this 15th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Moche for the Applicant

N/A for the Respondent

CA Ooko