REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLEANEOUS APPLICATION NO. 524 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LICENCING OFFICER.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE...2ND RESPONDENT

EX PARTE: TOM MBOYA ONYANGO

JUDGEMENT

Introduction

1. In his Notice of Motion dated 28th August, 2017 filed in this Court on 29th August, 2017, the ex parte applicant herein, **Tom Mboya Onyango,** seeks the following orders:

> **1. Prohibition to prohibit the 1st Respondent from revoking the Applicant's Firearms Certificate;**
>
> **2. Mandamus to compel the 1st Respondent to renew the Applicant's Certificate;**
>
> **3. Prohibition prohibiting the 1st Respondent either acting by himself or through his agents and or servants from recalling the Applicant's firearm;**
>
> **4. Prohibition to prohibit the 2nd Respondent either acting by himself or through his agents and or servants from arresting the Applicant for being in possession of firearm without a Firearms Certificate.**
>
> **5. The costs of this application be in the cause.**

Ex Parte Applicant's Case

2. According to the ex parte applicant, he is a Firearms Certificate and firearm holder having been issued with the Firearms Certificate Number 6543 on 24th August, 2012. Upon issuance of the said Certificate, the applicant deposed that he proceeded to purchase a firearm make one Taurus 9mm Pistol S/No. TGX 01269 and ammunitions 50 rounds of 9mm on 18th November, 213.

3. It was averred by the applicant that he has diligently renewed the said Certificate throughout the years

since issuance and has always complied with all the conditions required under the ***Firearms Act*** Cap 114 of the Laws of Kenya (hereinafter referred to as "the Act") without fail.

4. However on or about 14th November, 2014, the 1st Respondent revoked the applicant's firearms certificate and instructed him to surrender his said firearm and ammunitions to the Central Firearms Bureau on the grounds that the applicant was prohibited under section 5(7) of the Act to possess a firearm. However the said revocation was later cancelled and the certificate reinstated and the applicant has continued to hold the same to date. It was the applicant's case that he has not done act or committed any omission that contravenes the law, nor has he been declared unfit to be entrusted with the firearm nor done any act that would cause him to be repossessed of the firearm and or cause the Certificate not to be renewed.

5. The applicant averred that on 23rd August, 2017 he attended the 1st Respondent's offices and presented the Certificate was due to expire for renewal. However upon presentation thereof the 1st Respondent verbally directed him to leave it with him and declined to renew the same on grounds that the same was not properly issued.

6. According to the applicant he was not notified in writing as required under section 5 of the Act and neither was he accorded any hearing nor explained to the reasons for refusal to renew the said certificate.

7. According to the applicant, he has been active in providing the police with valuable information which has helped the police to act on issues affecting residents of Kibiko within Ngong Township and elsewhere in particular the series of rampant attacks that have been witnessed in the past in the area. The applicant revealed that it was as a result of the said attacks at his residence and on his person that he was issued with the firearm certificate. He disclosed that his residence has been attacked at least three times in the past and he has always reported the same to the police and the instances recorded in the occurrence book.

8. It was therefore the applicant's case that it is imperative that his certificate be renewed to enable him secure himself and his family.

9. According to the applicant since 23rd August, 2017 when he presented his said certificate, the 1st Respondent has failed to communicate with him in any way about the refusal to renew the same an action which according to him is unjustified as the same was renewed under the 1st Respondent's tenure in August, 2016. It was therefore his case that the said action is unreasonable and will deprive him of his right to protection of property, family and self.

10. Apart from reiterating the factual averments in the verifying affidavit and inappropriately introducing other factual matters in the submissions, the ex parte applicant submitted that by not serving him with a notice contemplated in section 5 of the Act, the 1st Respondent acted maliciously in retaining the applicant's certificate.

11. It was submitted that the 1st Respondent did not follow the procedure in revoking the certificate as section 5(7) of the Act is clear on the reasons for revocation, and since the Certificate had already expired, the 1st Respondent should be compelled to renew and reinstate the Applicant's Certificate, and specially with the new version certificates currently in use.

12. It was further submitted that the decision to revoke the applicant's Firearms Certificate was similarly irrational, unreasonable and without or in excess of jurisdiction.

Respondent's Case

13. The application as opposed by the Respondents.

14. According to the Respondents, the applicant herein claims to be a holder of a firearm certificate No.6543 allegedly issued on the 24th August 2012 at the Central Firearms Bureau by the then Chief

Licensing Officer. On the basis of the certificate, the applicant purchased the following firearms; Taurus pistol S/NP.TGX 01269 with 50 rounds of ammunition, Ceska Pistol S/No. a350666 with 50 rounds of ammunition 9mm ammunition, Shotgun S/No. 14Y10104 with 50 rounds of ammunition of 12 gauge and ceska pistol S/No. B395666 with 50 rounds of 6.35 ammunition.

15. It was averred that vide a letter dated 14th November, 2014, the Applicant's Firearm Certificate was revoked by the then Chief Licensing Officer with the further instruction that he surrenders to the Central Firearms Bureau, the Taurus 9mm Pistol S/NO. TGX 01269 he was in possession of together with any ammunition thereof. However, the Applicant, on 25th November 2014, appealed to the Chief Licensing Officer seeking the reinstatement of his Firearm Certificate Number 6543 on grounds that there were various attacks on his residence due to heightened insecurity in the area and his subsequent involvement in community policing endeavours. Accordingly, the Chief Licensing officer cancelled the revocation and renewed the firearm certificate stating clearly that the right process was not followed but due to the applicant's contribution in community policing and good work in support of the Police Service the certificate was reinstated.

16. It was averred that the applicant continued to use the firearm certificate till 23rd August 2017, when the Firearms Licensing Board was scrutinizing all the firearms certificates due for renewal with an aim of replacing old certificates with new versions, discovered serious anomalies with the applicant's certificate. Accordingly, the Board deferred the renewal of the applicant's certificate pending the verification of his certificate and requested him to surrender the four firearms and ammunition to the Board pending the said verification.

17. It was averred that based on the anomalies of the applicant's certificate, the Board sought to verify through the Government Printer which is the body that issues firearms certificates and the Government Printer wrote back to the Board on 30th August 2017 confirming that the applicant's firearm certificate was not genuine and did not originate from their offices. Based on the letter form the Government Printer confirming that applicant's firearm certificate was not genuine, the Board deliberated on the matter and revoked the applicant's certificate on 8th September 2017.

18. It was averred that pursuant to the salient provisions of section 5(8) of the ***Firearms Act*** Cap 114, Laws of Kenya, the Applicant was notified in writing of the revocation of his Firearm Certificate Number 6543 and asked to surrender all firearms and ammunition in his possession to the Officer Commanding Ngong Police Station or the Firearms Licensing Board Secretariat.

19. On the allegation that on 23rd August 2017 the applicant attended the Chief Licensing Officer's office and presented the certificate for renewal and was instructed to surrender the certificate on grounds of forgery, the 1st Respondent denied the same and contended that contrary to the Applicants allegations, the Office of the Chief Licensing Officer ceased to exist after the establishment of the Firearms Licensing Board which was established under section 3 of the ***Firearms Act*** through the ***Security Laws Amendment Act 2014*** and is mandated to issue, cancel, terminate or vary any license or permit issued under the Act and register civilian firearm holders among other functions.

20. It was the Respondents' position that there is no record of the applicant's application for the firearm certificate as required under section 5(1) of the ***Firearms Act*** and that the applicant does not have a grant letter issued by the then Chief Licensing Officer as proof of the approval for the application of a firearm.

21. It was the Respondents' contention that the right to own a firearm is not absolute and is thus subject to the provisions of the ***Firearms Act*** Cap 114, Laws of Kenya which regulates the licensing and controlling the manufacture, importation, exportation, transportation, sale, repair, storage, possession and use of firearms, ammunition, air guns and destructive devices and for connected purposes. To the Respondents, the refusal to renew the Applicant's Firearms Certificate and its subsequent issuance of the instruction to surrender the firearm and any ammunition thereof in his possession, the 1st Respondent remained faithful to its powers as set out within the provisions of section 5 subsection 7 of the ***Firearms Act*** Cap 114, Laws of Kenya.

22. It was the Respondents' case that in cancelling the revocation and granting the renewal of the Firearm Certificate, the Chief Licensing Officer clearly stated that the right process of acquiring the same was not adhered to.

23. It was further contended that the applicant moved this Court prematurely before filing an appeal against the revocation of the firearm certificate to the Cabinet Secretary as provided for under section 23 of the ***Firearms Act***. Accordingly, the Respondents contended that the instant application is made in bad faith, has no merit and is only calculated to discredit the credibility of the Respondents' mandate and function.

24. It was submitted on behalf of the Respondents that application herein is not within the purview of judicial review proceedings as it seeks to challenge the scope of judicial review , the basic tenets of which has been held in several precedents to include illegality, irrationality and procedural impropriety all of which the application before this Court fails to clearly depict.

25. To the Respondents, Judicial review proceedings do not lay focus on the merits of the impugned decision but rather on the process followed in reaching the decision itself and in that regard reliance was placed on **Republic vs. Director of Public Prosecutions & 2 Others, Exparte Francis Njakwe Maina & Another [2015] eKLR, Republic vs. Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR**, **Council of Civil Service Union vs. Minister for the Civil Service {1985} AC at P. 410** and **Hangsraz Mahatma Ganahi Institute & 2 Others [2008] MR 127**:

26. According to the Respondents, granting of the orders as sought in the application would be erroneous as such is limited to instances where there is an apparent error or omission that is self-evident and thus not premised on an elaborate argument for its establishment. In this case, the impugned decision by the 1st Respondent does not exhibit any blatant disregard or misinterpretation of the law that would require the indulgence of the courts intervention vide the application and prayers sought herein and in that respect the Respondents relied on ***Judicial Review Law, Procedure and Practice, 2009,*** at page 128 by **Peter Kaluma** and **Muyodi vs. Industrial & Commercial Development Corporation & Another [2006]1 EA 243.**

27. It was submitted that the application herein is an appeal disguised as a Judicial Review Application and should therefore not be entertained since there is a clear distinction between an appeal and judicial review proceedings. In Judicial review the court is only concerned with the fairness of the process under which the impugned decision or action was reached. Judicial review does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case as is the case in appeals and reliance was placed on ***The Code of Civil Procedure,*** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla.**

28. It was submitted that the Ex-parte Applicant has failed to exhaust the available Dispute Resolution Mechanisms in alternative to Judicial Review. To the Respondent, under the 2010 Constitution dispensation and upon the enactment of the ***Fair Administrative Action Act No. 4 of 2015*** in implementation of article 47 of the Constitution, the Judicial Review court is no longer the first place to seek refuge whenever a party is aggrieved by an administrative body. In particular, the Respondents referred to section 9 subsections (2), (3) and (4) of the said Act. It was the Respondents' case that this application is therefore not lodged in the correct forum because the Ex-parte Applicant ought to exhaust the alternative dispute resolution mechanisms established under sections 23 of the ***Firearms Act.***

29. In this regard the Respondents relied on **Republic vs. County Government of Nairobi & another ex-parte Isfandiar Sohaili [2017] eKLR.**

30. It was the Respondents' case that the orders sought in the Notice cannot be issued as pleaded since an order of prohibition is only issued to stop what has not happened. In the present case the revocation has already taken place. They referred to **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, **Kenya National Examinations**

Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR, Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572 and **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** where **Majanja J.** quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR.**

31. According to the Respondents since the applicant's firearm Certificate is expired by operation of time, even if the Court is minded to grant the orders it will be granting an expired certificate to the applicant hence this application has been overtaken by events.

32. In the result, it was submitted that the application herein does not meet the basic tenets of Judicial Review and should be dismissed in its entirety with costs to the respondent.

Determinations

33. I have considered the issues raised herein.

34. 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].

35. 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."

36. 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."**

37. 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.**

38. 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."**

39. 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."

40. In this case the applicant's case was that it had complied with all the conditions necessary for one to have the Firearms Certificate and that no case had arisen that would entitle the 1st Respondent to revoke his said Certificate. According to him, it was only when he went to renew his said Certificate that the same was impounded without him having been notified of the same.

41. 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.

42. What the Constitution requires in my view is the notification of the reasons for the withdrawal of the Certificate since the reasons for the withdrawal thereof 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.

43. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** it was held by the court of appeal as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...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...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."

44. 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.*

45. In this case the applicant's case was that on 23rd August, 2017 he attended the 1st Respondent's offices and presented the Certificate that was due to expire for renewal and it was upon presentation thereof that the 1st Respondent verbally directed him to leave it with him and declined to renew the same on grounds that the same was not properly issued. The Respondents have however produced a letter dated 8th September, 2017 allegedly cancelling the applicant's said certificate. The copy exhibited before the Court however has only the first page without a signature. Apart from that there is no evidence that the same was ever dispatched. To make matters worse the said letter was drafted after these proceedings were commenced.

46. Importantly, the said letter does not require the applicant to present his version regarding the cancellation of the said Certificate as it is in effect the decision cancelling the Certificate.

47. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

48. 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 a report was received from the Government Printer contending that the Applicant's Certificate was not genuine considering that the said Certificate had been renewed regularly in the past by the 1st Respondent. To my mind the report from the Government Printer could only form a basis from which the Applicant could be called upon to answer. That report had to be considered amongst other evidence from the applicant before a determination made as to whether the threshold under section 5(7) aforesaid was met. To fully rely on a report by a third entity as a basis for arriving at a decision in my view amounts to the Respondents abdicating their mandate.

49. Section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** provides that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

50. In **Hardware & Ironmonery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA**

271, the Court expressed itself as follows:

> **"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."**

51. **Lord Somervel** in **Vine vs. National Doc Labour Board [1956] 3 All ER 939**, at page 951 held that:

> **"The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."**

52. In **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR,** the High Court cited with approval the decision in ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***, where it was held as follows:

> *"**Discipline at the Respondent's University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency."***

53. It is therefore clear that the manner in which the 1st Respondent purported to have cancelled he Applicant's Firearms Certificate was tainted with procedural irregularity.

54. Apart from the foregoing, the 1st Respondent by renewing the Applicant's Certificate despite the said misgivings created a legitimate expectation on the part of the Applicant that any irregularities in the issuance of the same would not be detrimental to the applicant's interest, at least not without affording the applicant a hearing thereon. This was the position of **Lord Diplock** in **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where it was stated, at page 949 as follows:-

> **"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for**

contending that they should not be withdrawn." (Emphasis supplied).

55. Therefore if a public authority is to depart from previous decisions in similar cases, it was submitted it must then demonstrate good reason for that departure. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

> **"Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."**

56. It is therefore my view that in this case the applicant's legitimate expectation was thwarted by the 1st Respondent's decision which was based on an alleged irregularity which the 1st Respondent had by its words and action clearly waived.

57. It was however contended that the Applicant ought to have appealed the decision. 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.***

58. In this case however, from the letter purportedly cancelling the Certificate it is clear that the said decision was made after the Applicant had commenced these proceedings. Therefore the Applicant could not have been expected to appeal against a decision which was yet to be communicated to him.

59. The Respondents submitted that since the decision to cancel the Certificate had been made an order of prohibition cannot issue. As I have stated above, when the Applicant came to Court, the decision cancelling the Certificate had not yet been communicated. Accordingly, the Applicant was within his rights to seek a prohibitory order.

60. This Court appreciates that the 1st Respondent has now purported to have made a decision. However 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, including 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.

In my view by employing the word "including" the provisions empowers this Court to fashion appropriate remedies which in my view must be effective remedies. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

> **"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."**

61. In this case, section 5(4) of the ***Firearms Act*** provides that:

> ***A firearm certificate shall, unless previously revoked or cancelled, continue in force for one year from the date when it was granted or last renewed, but shall be renewable for a further period of one year by a licensing officer, and so on from time to time, and the foregoing provisions of this section shall apply to the renewal of a firearm certificate as they apply to the grant of a firearm certificate.***

62. In my view unless a certificate is previously cancelled or revoked, the same is, unless section 5(7) applies, renewable. In this case the 1st Respondent has not satisfactorily proved that the conditions under section 5(7) of the Act have been fulfilled in order to justify non-renewal.

63. As a parting shot I wish to restate this Court's position in **Bryan Yongo vs. Chief 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."

64. 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.

65. 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."

66. 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.

67. In the premises I find merit in the Notice of Motion dated 28th August, 2017.

Order

68. 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. A declaration that the decision to cancel or revoke the Applicant's Firearms Certificate was unlawful.

2. An order setting aside the 1st Respondent's decision to cancel or revoke the Applicant's Firearms Certificate.

3. An order compelling the 1st Respondent to renew the Applicant's Certificate upon payment of the requisite charges.

4. An order prohibiting the 1st Respondent from revoking the Applicant's Firearms Certificate unless otherwise lawfully revoked.

5. Prohibition to prohibit the 2nd Respondent either acting by himself or through his agents and or servants from arresting the Applicant for being in possession of firearm without a Firearms Certificate.

6. The costs of this application are awarded to the Applicant to be borne by the 1st Respondent.

69. It is so ordered.

Dated at Nairobi this day 15th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Opondo for the Applicant

CA Ooko