



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 268 OF 2014 (JR)

IN THE MATTER OF AN APPLICATION ON BEHALF OF BRYAN

YONGO OTUMBA HERE IN AFTER REFERRED TO AS THE

“SUBJECT” FOR JUDICIAL REVIEW FOR ORDERS OF

PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE DECISION OF THE PROVINCIAL

CRIMINAL INVESTIGATIONS OFFICER AND THE CHIEF

LICENCING OFFICER, CENTRAL FIREARMS BUREAU VIDE

COMMUNICATION BY THE INSPECTOR SHURIA

AND

IN THE MATTER BETWEEN

BRYAN YONGO OTUMBA.....APPLICANT

VERSUS

**THE HON. ATTORNEY GENERAL FOR AND ON BEHALF OF THE INSPECTOR GENERAL
OF POLICE, THE PROVINCIAL CRIMINAL INVESTIGATION OFFICER, NAIROBI, THE
CHIEF LICENCING OFFICER , CENTRAL FIREARMS BUREAU**

EX-PARTE:

JUDGEMENT

Introduction

1. In its Notice of Motion dated 14th July, 2014 filed in this Court on 15th July, 2014, the ex parte applicant herein, **Bryan Yongo Otumba**, seeks the following orders:

1. That this honourable court be pleased to grant an order of prohibition directed against the

- INSPECTOR – GENERAL of the Kenya police
- The CHIEF LICENCING OFFICER, FIREARMS

BUREAU.

- The PROVINCIAL CRIMINAL INVESTIGATIONS

OFFICER NAIROBI AREA

- The OFFICER COMMANDING SPRING VALLEY

POLICE STATION their agents, servants or proxies

from confiscating and/or revoking the

subject/Applicant Firearm Certificate No. 8903.

2. That this honourable court be pleased to grant an order of Certiorari, to remove and to bring to the High Court for the purpose of quashing the decision b Inspector General of Police, the Chief Licencing Officer Central Firearms Bureau, the PCIO Nairobi Area, the OCS Spring Valley or their agents, proxies, servants from revoking and/or confiscating the Subject/Applicants Firearm Certificate of firearms;

3. That cost of this application be provided for.

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by the Applicant on 9th July, 2014.
3. According to the Applicant, he is a licensed firearm holder vide firearm certificate No. 8903 which he has held since 26th July, 2012 and has always complied with all the conditions required of him under the **Firearms Act** Cap 114, Laws of Kenya (hereinafter referred to as the Act).
4. According to him he requires the said firearm for his personal security and the security of his family members. As he is not intemperate and his security and that of his family has been under serious threat as a result of his testimonies before several parliamentary committees. He therefore deposed that an attempt to withdraw or revoke his firearm certificate is likely to expose his life to a risk.
5. He also deposed that from the nature of his business that of engaging in security guard company known as **Neptune Security Guards**, it is necessary for him to have the firearm licence for his own protection.
6. However, he deposed that he is now required to immediately hand over his firearm to the relevant authorities an act which is likely to compromise his security and that of his family.
7. According to him on 30th June, 2014, he received a call from one **Inspector Shuria** who informed him that one **Hiten Shah** had complained that the applicant in the company of some police officers had threatened him and the applicant was required to see the said police officer the following day.
8. The following day in obedience to the said summons he went to the said officer's office where he was informed of the same information but without full particulars and he was asked to record a statement which he did.
9. According to the applicant, the said **Hiten Shah** owed him alongside **Kenneth Milton Nthiga** the sum of Kshs 46,200,000.00 and the applicant had lodged a complaint against him for the offence of obtaining by false pretences at Parklands Police Station pursuant to which the said **Hiten Shah** was summoned to respond thereto.

10. It was further deposed that the said **Hiten Shah** offered to restate the same and gave the applicant post-dated cheques totalling the sum of Kshs 45,000,000.00 and paid the applicant a further sum of Kshs 200,000.00 as part payment thereof.
11. However after recording his statement on 30th June, 2014, the applicant deposed that on 3rd July, 2014, **Inspector Shuria** called him and informed him that he had been directed by the PCIO Nairobi Area to confiscate the applicant's firearm. According to the applicant he disputed the manner in which the said confiscation was being undertaken
12. It was the applicant's case that it is preposterous, malicious and extortionate for the Kenya Police officers to harass, intimidate and threaten him with the revocation of his firearm on the basis of his complaint against the said **Hiten Shah** hence any investigation of the applicant's property is a direct contravention of his constitutional rights and freedoms under the Constitution.
13. According to the applicant from the past conduct of the said **Inspector Shuria** in commencing spurious complaints against the applicant in the past, the intended actions are actuated by malice and the desire to hit back at him.
14. It was deposed that on 5th July, 2014 seven armed police officers went to his residence and informed the applicant's guards that they had been instructed to confiscate the applicant's firearm and upon being denied entry attempted to force their way inside the premises.
15. According to the applicant, his right to privacy was under threat and the orders sought are necessary to preserve the status quo and to prevent violation of his constitutional rights.
16. To him, the Respondents' actions are precipitated by bad faith and failure to give reasons for their decision suggests that there is no good reason and the resultant decision is irrational and there is therefore considerable overlap with the other sub-headings of irrationality such as unreasonable, irrelevant consideration, improper motive, abuse of power and revenge. Further, Respondents seek to confiscate his firearm without the due process of the law on such spurious and malicious allegations cannot be termed as an "impartial inquiry" as it is biased and discriminatory.
17. According to the applicant, jurisdiction (such as not addressing the applicable law) and fundamental errors do attract certiorari and it is important to emphasize that the Applicant had legitimate expectation that the police would conduct itself in a legal manner. He further deposed that he had not been charged in any court of law that would warrant the firearm to be an exhibit and his right to presumption of innocence, to testify against himself has not been called into question and this is merely an "inquiry" which must be forwarded to the Director Of Public Prosecution for directions hence the Respondents' actions are premature. Further by imputing, suggesting or implying the commission of a Criminal offence by Applicant before any charges are preferred, the Applicant has been denied the right to equality of arms therefore disadvantaged in any future trial.
18. The applicant swore a further affidavit on 30th September, 2014 in which he deposed that the deponent of the replying affidavit not being **Inspector Shuria** had no capacity authority and competency to swear the replying affidavit hence his assertions in the verifying affidavit as regards what **Inspector Shuria** remained un-rebutted.
19. According to him the intention to revoke his firearm was clear from the replying affidavit. ,yet it is only the Chief Licensing Officer who has power to act under the Act and in a particular manner hence the Respondents were acting without power.
20. He disputed the allegation that he threatened **Atula Shantilal Versshi Shah** and asserted that he was accompanied by police officers and reiterated that the debt due to him was not denied.
21. He averred that with respect to issue of spent cartridge nothing in terms of ballistics report was produced to confirm or show that the shots came from his firearm and further that the alleged summons apparently served on his property were just a falsehood.
22. The applicant invited the Court to take note of the fact that his

Firearm Licence had been renewed.

Respondent's Case

23. In response to the application the Respondent filed a replying affidavit sworn by **P C Lawrence Kitisia**, a police officer attached to Directorate of Criminal Investigations stationed at County Criminal Investigations Headquarters, Nairobi County engaged in investigation duty.

24. According to him, the application is premature baseless and otherwise intended to derail obstruct and/or defeat and discredit the ongoing investigation to the detriment of justice, law and order. Further the prayers sought cannot issue as there is no decision made either verbal or express as alleged save that the request for surrender of the subject of this case for purposes of investigations which request is duly provided under provisions of cap 114 laws of Kenya.
25. It was deposed that indeed investigations into this matter commenced following a report made by one **Atula Shantilal Versshi Shah** on the 30th day of June, 2014 that she was threatened by the Applicant with a gun in her office pursuant to which the county criminal investigation officer directed investigations to be instituted immediately upon the said report and he was instructed to commence investigation into the matter. On 1st July, 2014, the ex-parte applicant was summoned to the office and informed of the complaint and he made, a self-recording statement in response admitting that he was indeed at the office of the complainant but denied having threatened or used his gun whatsoever. On the same date the police recorded a statement from one **Ahmat Al Hadj Adam** who confirmed to have been present during the incident and from the statement it was clear that he indeed witnessed the Ex-parte applicant pointing gun at the said **Atula Shantilal Versshi Shah**.
26. It was the deponent's case that from the statement of the three persons including the Ex-parte applicant the police formed a tangible opinion that investigations should commence and upon establishing that indeed the Ex-parte applicant is a licensed gun-holder they requested the licensing officer to have the license and fire arms surrendered to enable investigation to be carried out which request was done pursuant to the provisions of the **Firearms Act**, Cap 114, Laws of Kenya and hence cannot be construed to mean cancellation or revocation but a temporal surrender for the period of investigation.
27. It was further deposed that from further investigations and findings is emerged that there is a high probability that an offence has been disclosed that requires a trial by a court. To him, the investigation report and file had since been forwarded to the office of Director of Public Prosecution vide a letter ref. CID/C/CRI/6/4/VOL.23/131 date 15th July, 2014, with recommendation that the applicant be charged with the offence of creating disturbance contrary to section 95 (1) (b) of the **Penal Code** and if the Director of Public Prosecution agrees with the recommendations, the firearm will be used as an exhibit.
28. It was deposed that in the course the investigations the police also came across another report of attempted murder pending investigation at the Spring Valley Police Station wherein the Ex-parte applicant threatened security guards and indeed fired one round of ammunition while ordering the guards to kneel down.
29. To the deponent, he had no personal vendetta against the applicant but was purely investigating an allegation made by **Atula Shantilal Shah**.
30. In his view, the right to own a firearm in Kenya is not absolute and the powers to issue a license are granted under Cap 114, section 5 of the firearm Act. According to him, the application herein has been filed in bad faith and is an attempt to defeat the course of justice hence the applicant's application ought to be dismissed and he be asked to comply with the directions of Chief Firearms Licensing Officer.

Determinations

31. I have considered the application, the supporting affidavit, the affidavit in reply as well as the submissions filed.
32. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can

only prevent the making of a contemplated decision..... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done.....Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

33. Therefore for an order of prohibition to issue there must be a threat of an unlawful action on the part of the Respondent.
34. The purpose of judicial review proceedings as opposed to the normal civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council* (1991) 1 All ER 282, at P. 285.
35. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.
36. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It 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. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

37. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **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 and held:

“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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”

38. In this case it is contended that the Respondents have intimated that they intend to revoke the applicant's firearm licence without following the due process. According to the applicant, this information was given to him by one **Inspector Shuria**. Apart from that police officers went to his residence with an intention of confiscating his licence. The Respondents on the other hand have denied that that is their intention. According to them, the intention of taking possession of the said firearm was in order to assist in the conduct of investigations of a reported criminal offence.
39. That the police are empowered under section 60 of the **National Police Service Act** to take possession of anything suspected to have been used in the commission of an offence is not in doubt. That power is clearly different from the power to revoke a firearms licence and where the police are investigating the commission of a criminal offence relating to the use of firearms, I do not see the reason why the Court should prohibit the police from taking possession of the firearm in question for the sole purpose of conducting their investigations. For the Court to issue a blanket order prohibiting the police from doing so would amount to unduly interfering with the investigatory powers of the police and that is not the function of a judicial review court.
40. According to the applicant the information that his firearm was to be confiscated pursuant to the revocation of his firearms licence was made orally. The Respondent's have however exhibited a copy of a letter dated 4th July, 2014, in which it was clearly indicated that the police were investigating an allegation made by one **Atula Shantilala Vershi Shah** that the applicant had threatened her with a firearm. The applicant was therefore requested to surrender his firearm

pending the said investigations. It would however seem that the investigations have since been completed and that a recommendation made that the applicant be charged and that his licence be revoked pursuant to section 5(7)(a) of the Act. Taking into account the fact that the applicant's licence was according to him in fact renewed, it would confirm the Respondent's contention that there was no intention to revoke the said licence in the first place.

41. It would therefore seem to be clear that the applicant's firearm is no longer required for the purposes of conducting the said investigations though that does not preclude the Chief Licensing Officer from commencing legal proceedings towards the revocation of the applicant's licence.

42. Having considered the material before me and in light of the fact that the allegations made against **Inspector Shuria** were not controverted the order which commend itself to me is that there be a prohibition directed to the Respondents prohibiting them from revoking the applicant's firearms licence unless the due process of the law is adhered to. The said due process ought to be in line with section 5(7) of the **Firearms Act**, Cap 114 of the Laws of Kenya which 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.

43. With respect to the order of certiorari, I am not satisfied based on the material before me that any such decision had in fact been taken since no such decision has been exhibited as required by Order 54 rule 7(1) of the **Civil Procedure Rules**. The said provision provides:

(1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.

44. The rationale for the requirement that what is sought to be quashed is to be exhibited is informed by the fact that the Court ought to be satisfied that there is in fact a decision that has been made and exists whose quashing is sought since the court does not ordinarily grant orders in vain. Secondly, the court must be satisfied that what is exhibited is in fact the correct decision. Thirdly, the court must be satisfied as to the exact time when the decision was made in light of the limitation period of six months stipulated under the **Law Reform Act** Cap 26 Laws of Kenya.

45. In light of the failure to exhibit the impugned decision assuming it exists and in light of the express denial that there is in fact such a decision, I decline to grant the order of certiorari as sought.

46. On the issue of costs, it is clear that these proceedings were not properly intitled. It is now trite law that the substantive Notice of Motion ought to be brought in the name of the Republic rather than the ex parte applicant. This is so because Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

47. Therefore as the application was not properly intitled, each party will bear own costs of these proceedings.

48. It is so ordered.

Dated at Nairobi this day 14th day of January, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

The applicant in person

Cc Patricia