



**Ayacko v Cabinet Secretary for Ministry of Interior & Coordination of National Government & 3 others; Firearms Licensing Board (Interested Party) (Petition 3 of 2023) [2024] KEHC 17031 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
PETITION 3 OF 2023  
RPV WENDOH, J  
MAY 2, 2024**

**BETWEEN**

**HON OCHILLO AYACKO ..... PETITIONER**

**AND**

**THE CABINET SECRETARY FOR MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY COMMANDER MIGORI COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**FIREARMS LICENSING BOARD ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner Hon. Ochillo Ayacko is the current Governor of the Migori County.
2. The 1<sup>st</sup> Respondent Cabinet Secretary for Ministry of Interior and Coordination of National Government is described as the Cabinet Secretary in charge of supervising and/or overseeing matters of internal security both within the counties and the national government in the Republic of Kenya.
3. The 2<sup>nd</sup> Respondent Inspector General of Police is described as a constitutional office created under Article 245 of *the Constitution* and the holder is a person with independent command over the National Police Service.
4. The 3<sup>rd</sup> respondent County Commander Migori County is described as an officer serving under the National Police Service in charge of Migori County on behalf of the 2<sup>nd</sup> respondent.



5. The 4<sup>th</sup> Respondent Honourable Attorney General is described as the Chief Legal Advisor of the Government of the Republic of Kenya and the representative of the Government of Kenya within the meaning of Article 156 of *the Constitution* and the Office of the Attorney General *Act No. 49 of 2012*.
6. The Interested Party, the Firearms Licensing Board is described as an appointee of the Inspector General of Police within the meaning of Section 3 of the *Firearms Act* Cap 114 Laws of Kenya.
7. This petition is dated 15/11/2023, commenced by the petitioner and it is supported by the affidavit of the petitioner sworn on even date together various annexures.
8. The facts upon which the petition is based, are that the petitioner is a law-abiding citizen and the elected Governor of Migori County in the general elections held in August 2022; that the petitioner is a licenced holder of a Firearm Serial No. FDB 748 since the year 2002 by dint of Licence Number 007532. The petitioner alleges that his firearm has never been misused, withdrawn, or recalled by the government; that on or about 20/7/2023, the 3<sup>rd</sup> respondent acting under the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents visited the petitioner's residence and took away the petitioner's firearm. In addition to the above, the 1<sup>st</sup> and 2<sup>nd</sup> respondents unlawfully withdrew the security officers attached to the petitioner therefore, exposing him to danger knowing that he is unarmed and unprotected.
9. The petitioner alleges that the respondents infringed his rights when they took away his firearm without giving reasons for the withdrawal of the firearm, failure to comply with Section 5 of the *Firearms Act*, failing to return the firearm after demand, acting capriciously, whimsically and in contravention with the law and regulations pertaining to firearms and usurping the powers of the interested party of licencing the petitioner.
10. The petitioner contends that the actions of the respondents are an affront to Articles 10, 25( c), 27 (1), 27 (2), 47 (1) and 47 (2) of *the Constitution*. It his case that the respondents are bound by Article 47 and 50 (1) and (2) of *the Constitution* which guarantees the petitioner the right to fair administrative action and hearing respectively; that the failure by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to give notice and/or reasons for the withdrawal of the petitioner's firearm and failure to accord the petitioner an opportunity to be heard contravenes the unequivocal provisions of Articles and 50 (1) and (2) of *the Constitution* and The Fair Administrative Actions Act 2015.
11. The petitioner pleaded that being the officer bearer of the position of the Governor of Migori County, his personal security is paramount in the execution of his duties; that the withdrawal of the petitioner's security and personal weapon is detrimental to him; that he has been treated with discrimination as officers of his rank and even below have been provided with security and none of their personal weapons have been confiscated; that the petitioner has never been charged with any offence in a court of law in relation to the ownership of a personal weapon. The petitioner stated that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents are unconstitutional and they impede the petitioner's work.

The petitioner prayed for:-

- a. A Declaration be issued that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to confiscate the firearm from the petitioner is irregular, unconstitutional and void;
- b. Theta the court do issue an order of mandamus directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and by any one acting under them to immediately restore the petitioner's firearm to the petitioner;
- c. An order of mandamus do issue against the 3<sup>rd</sup> respondent to hand over the petitioner's fireman to him;



- d. That the court be pleased to issue orders of mandamus against the interested part to observed compliance of the orders herein;
  - e. That the court do issue any other orders, directions, remedies that the court shall deem fit and just to grant in the circumstances.
  - f. An order that the respondent do pay the costs of this petition.
12. The Office of the Hon. Attorney General entered appearance on behalf of the respondents by filing a notice of appointment on 10/1/2024. The respondents did not make any appearances in court, file any responses, or defend their position in any manner thereafter.
  13. To further support his case, the petitioner filed written submissions dated 19/1/2023. It was submitted that the petitioner was not accorded a chance to be heard or issued a notice to defend himself contrary to Section 4 (3) (a) of the Fair Administrative Act and Article 47 (1) and (2) of *the Constitution*. The petitioner relied on the findings in Kisumu High Court Petition No. 1 of 2017 Iganga Alfred Arunga v University of Nairobi and Keroche Industries Limited v Kenya Revenue Authority & 5 Others (2007) KLR 240. The petitioner submitted that he handed over his firearm under duress to the police who claimed to be under instructions of the County Police Commander; that the respondents have an obligation to be transparent, accountable and exercise other principles of good governance.
  14. It was further submitted that the doctrine of ultra vires and Articles 10 (2) and 47 of *the Constitution* protect the public interest by ensuring that public bodies and officers act strictly within and according to the law to prevent abuse of power; that the Minister for Interior Coordination of National Government, Inspector General of Police and County Commander Migori County had no capacity to act outside the law and when they did, their actions are ultra vires, null and void ab initio; that the respondents have not made any attempt to regularise their illegal actions against the petitioner; that the respondents caused the withdrawal of security officers attached to the petitioner who are given to all persons of leadership status subject to Part 5.3 XII of the Policy on Provision of Protective Security to VIP and other State Officers; that the right to protection and safety of the petitioner as provided under *the Constitution* and various legislation is not a gift from the state which can be suspended on the whims of any state organs. The petitioner urged this court to intervene over the petitioner's constitutional rights and sanctions the respondents' actions.
  15. The petitioner submitted that he was never accused, arrested, charged, tried or notified of committing, aiding and/or doing any of the enumerated restrictions under Part 5.3 XII of the Policy on Provision of Protective Security to VIP and other State Officers; that the petitioner was not given any hearing by the respondents despite efforts to find out why his security has been withdrawn contrary to Article 50 (2) (a) of *the Constitution* which guarantees right to fair trial which includes the right to be presumed innocent until the contrary is proved.
  16. It was submitted that the actions of the respondents are not anchored on any legal process; that the draconian decision to confiscate the petitioner's firearm and withdraw his personal security was not anchored in law. To buttress this proposition, the petitioner relied on the cases of RE: Hardial Singh & Others (1979) KLR 18; (1976 - 80) 1 KLR 1090, Republic v Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A Bhatt & Company Nairobi HCMA No. 285 of 2006 and Nairobi High Court Misc. Application No. 430 of 2004 Leonard Sitamze v The Minister for Home Affairs & 2 Others where the common findings in all the decisions is that a court can interfere and/or review judicial, quasi - judicial or administrative actions where the office holders do not act in good faith or act on extraneous considerations.



17. I have carefully considered the petition the exhibits and submissions by the petitioner. The issues for determination that arise therefrom are: -
- a. Whether the rights of the Petitioner’s (if any) have been violated.
  - b. What are the appropriate and just orders this court can make in respect to the petition?
18. Article 258 (1) of *the Constitution* gives every person the right to institute legal proceedings claiming that *the Constitution* has been contravened or is being threatened with a contravention.
19. The guidelines of filing constitutional petitions are provided for in *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) (Mutunga Rules). Rule 9 (b) (1) provides as follows:-
- The petition shall disclose the following—
- The petitioner’s name and address;
- (ii) The facts constituting the case;
  - (iii) The nature of injury caused or likely to be caused to the petitioner, or in a public interest case to the public, class of persons or community;
  - (iv) Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which could be related to the matters in issue in the petition;
  - (v) The petition shall be signed by the petitioner or his advocate;
  - (vi) The relief sought by the petitioner;
20. From the above provision, it is the law that a petition must be clear on what it challenges. There should be a precise nexus between *the Constitution* and the alleged violations. The petition must raise constitutional issues.
21. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others* (2014) eKLR had the following to say in the manner in which constitutional petitions should be filed:-
- “Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”
22. In the case of *Fredricks & Other v. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court defined what constitutional issues entail as follows:-
- “*The Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself...Constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*,



as well as issues concerning the status, powers and functions of an organ of State... the interpretation, application and upholding of *the Constitution* are also constitutional issues.” (emphasis mine)

23. From the foregone, the position is that constitutional issues are those which confront the various violations in respect to the Bill of Rights or *the Constitution* itself. The constitutional petition must demonstrate the link between the aggrieved person and the alleged breached constitutional provisions and the contravention or infringement.
24. I have perused the petition. It contains among others, the description of the parties, the basis of the petition, the fundamental legal issues which give rise to the petition, the particulars of the alleged infringement and violation of constitutional rights and the relief sought. The petition clearly brings out the alleged manner of violation of the constitutional rights and the effect thereof the petitioner. The petition is therefore fully compliant with the principles set out in the Communications of Kenya & 5 Others case (supra) and with Rule 9 of the Mutunga Rules.
25. The petitioner laments that despite being a lawful holder of a licenced firearm, the 1<sup>st</sup> - 3<sup>rd</sup> respondents arbitrarily confiscated it without according him an opportunity to be heard. It is not controverted that the petitioner is licenced by the Firearms Licensing Board to hold a firearm. The particulars of his license (OA -1) shows that the petitioner is licenced under Licence No. 007532 to hold the Firearm Type Glock bearing Serial No. FDB 748.
26. The *Firearms Act* Cap 114 Law of Kenya Section 3 establishes the Firearms Licensing Board (interested party). Section 3 (2) of the Act provides that the Board members of the interested party appointed by the Cabinet secretary shall consist of a Chairperson and: -
  - (a) two representatives from the National Police Service one of whom shall be from the Directorate of Criminal Investigation;
  - (b) one representative from the Office of the Attorney-General;
  - (c) one representative from a private members group of lawfully registered gun owners;
  - (d) one representative from the Kenya Wildlife Service;
  - (e) one representative from the National Intelligence Service; and
  - (f) one representative from the National Focal Point.
27. Under Section 3 (5) of the *Firearms Act*, the duties of the interested party are:-
  - (5) The functions of the Board shall be to-
    - a. Certify suitability of applicants and periodically assess proficiency of firearms holders;
    - b. Issue, cancel, terminate or vary any licence or permit issues under this Act;
    - c. Register civilians firearm holders, dealers and manufacturers of firearms under this Act;
    - d. Register, supervise and control all shooting ranges that are registered under this Act;
    - e. Establish, maintain and monitor a centralised record management system under this Act;
    - f. Perform such other functions as the Cabinet Secretary may prescribe from time to time.
28. Section 5 (7) of the *Firearms Act* gives the Licencing Officer the powers to revoke a firearm certificate under the following circumstances: -



A firearm certificate may be revoked by a licencing officer if-

- a. The licencing officer is satisfied that the holder is prohibited by or under this Act from possession a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or otherwise unfit to be entrusted with a firearm; or
  - b. The holder fails to comply with a notice under subsection requiring him to deliver up the firearm certificate.
29. Therefore, powers to revoke a firearm certificate is an exclusive function of the interested party. Prior to the revocation, there is a statutory precondition to the exercise of this power. The interested party must be satisfied that the licensed firearm holder is prohibited to hold a firearm or has failed to comply with the notice requiring him to deliver up the firearm certificate.
30. The letter dated 20/7/2023 (OA -2) authored by C.I. Oscar Bungei purported to confiscate the firearm belonging to the petitioner under the instructions of the 3<sup>rd</sup> respondent one Mr. Peter Kimani. There was no prior notice to the petitioner from the interested party requiring him to surrender his firearm certificate prior to the surrender of his firearm.
31. Seemingly, the decision to confiscate the firearm was from the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent acted ultra vires as he is not part of the persons who are the Board Members comprising the interested party under Section 3 (2) of the *Firearms Act*. It is only the Board members of the interested party who have the powers to issue notices requiring a firearm holder to deliver a firearm certificate. Therefore, the decision of the 3<sup>rd</sup> respondent was ultra vires the provisions of the *Firearms Act* and thus illegal.
32. Even if the 3<sup>rd</sup> respondent had a legitimate reason to confiscate the petitioner's firearm, Article 10 of *the Constitution* behoves the office holder of the 3<sup>rd</sup> respondent to adhere to the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever they enact, apply, interpret *the Constitution* or any law and implement public policy decisions.

Article 47 (1) and (2) of *the Constitution* provides: -

- “(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.”

Article 47 (3) provides that Parliament shall enact legislation to give effect to the rights in Article 47 (1) and (2). In compliance thereof, Parliament enacted the Fair Administrative Actions Act, Cap 7L (FAA). Section 4 of the FAA gives a comprehensive irreducible minimum in which a person who is about to be affected by an administrative decision is to be accorded. These include among others, the right to be given notice of the decision and the reasons for the proposed administrative action, an opportunity to be heard, to be given information, material and evidence to be relied upon and so forth.

33. *Mrima J in Kahia v Inspector-General of Police & 5 others; Chief Licensing Officer, Firearm Licensing Board & Another (Interested Parties) (Constitutional Petition E413 of 2021) [2023] KEHC 1089 (KLR) (Constitutional and Human Rights) (23 February 2023) (Judgment) held:-*

“The entrenchment of Article 47 in *the Constitution* was a deliberate move by Kenyans in demanding inter alia fairness, transparency and accountability in public administration.



Public officers must, therefore, embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and execute administrative decisions complies with Article 47 of the Constitution and the Fair Administrative Actions Act.”

34. Applying the foregone principles, there were no reasons advanced to the petitioner by the 3<sup>rd</sup> respondent either acting by himself or under the directions of any other person as to which provision of Section 5 (7) of the Firearms Act had been contravened by the petitioner to warrant confiscation of his firearm.
35. The petitioner being a Governor of the Migori County, indeed attracts both persons of good will and ill will and is entitled to protection. The petitioner pleaded that he has been a holder of the firearm since the year 2002 making it a period of 22 years with no proven track record of misuse of the Firearm contrary to the provisions of the Firearms Act.
36. It is commonplace that persons who hold such political offices are to be accorded security and should be assured that they are not exposed to security risks. To intentionally deprive them of the much-needed security, is discriminatory and contrary to the provisions of Article 27 (1) of the Constitution which assures every person that they are equal before the law and they have the right to equal protection and equal benefit of the law.
37. From the foregone discourse, it is the finding of this court that the provisions of Articles 27 (1), 47 (1) and (2) of the Constitution as read with Section 4 of the Fair Administrative Actions Act were variously infringed by the 3<sup>rd</sup> respondent either by himself or working under the instructions of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents who are members of the Board of the interested party.
38. Having found so, I will now deal with the remedies as sought by the petitioner. Article 23 (3) of the Constitution provides that proceedings which are brought for the enforcement of rights in accordance with Article 22, a court may grant appropriate reliefs including: -
  - (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
  - (e) an order for compensation; and
  - (f) an order of judicial review.
39. The Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR dealt with the issue of damages as a relief in constitutional violations. The Learned Judges rendered themselves as follows:-

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court. However, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just “according to the facts and circumstances of a particular case. As stated above, the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and



proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy..."

40. Given the circumstances if this case, declarations and orders of judicial review will suffice as prayed by the petitioner.
41. Before I give my final orders, the petitioner pleaded that his security personnel were also withdrawn. Unlike the confirmation before this court of how his firearm was confiscated was produced in evidence, I am not able to determine whether the petitioner's security personnel being withdrawn was indeed, a matter of fact.
42. Flowing from the above, the final orders do issue as follows: -
  - a. A Declaration be and is hereby issued that the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to confiscate the firearm from the Petitioner is irregular, unconstitutional and void;
  - b. An Order of Mandamus is hereby issued directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and by any one acting under them to immediately restore the Petitioner's firearm to the Petitioner;
  - c. An Order of Mandamus is hereby issued against the 3<sup>rd</sup> Respondent to hand over the Petitioner's firearm to him;
  - d. An Order of Mandamus is hereby issued to the Interested Party to observe compliance of the orders herein;
  - e. Costs of this petition awarded to the Petitioner.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 2<sup>ND</sup> DAY OF MAY, 2024.**

**R. WENDOH**

**JUDGE**

Judgment delivered in the presence of

Mr. Abisai for the Petitioner.

No appearance for the Respondents.

No appearance for the Interested Party.

Emma & Phelix Court Assistant

