



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 184 OF 2019

MELVIN CHIRO BANDARI.....PETITIONER

VERSUS

1.THE CHAIRMAN, FIREARMS LICENSE BOARD

2.THE CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNANCE

3.THE INSPECTOR GENERAL –KENYA POLICE SERVICE

4.ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....RESPONDENTS

JUDGMENT

1.The Petitioner is a duly licensed firearm holder under Civilian Firearm Certificate No. 00xxxx and ID Number xxxx issued on the 14/3/2012 after he satisfied the board of his needs to hold a firearm.

2. The Respondents are Constitutional bodies and officers serving under the Constitution.

The Petitioner's Case

3.The Petitioner filed Petition dated 5/11/2019 stating that the 2nd Respondent issued a directive requiring all civilian firearm holders to undergo a mandatory vetting exercise. However, the Petitioner states that he got the information from the 2nd Respondent via text message while he was bedridden and as a result he was unable to attend the vetting exercise.

4.The Petitioner avers that upon recovery, he wrote a letter dated 30/8/2019 to the 2nd Respondent seeking an opportunity to present himself for vetting. Unfortunately, the 2nd Respondent denied him that opportunity and vide letter dated 11/9/2019, he was ordered by the 1st Respondent to handover his firearm type S/A Pistol Serial No. RYK831 to any police station within the country. The Petitioner avers that he complied with the said directive and handed over his firearm to the officer in charge of Mtwapa Police Station.

5.It is the Petitioner's case that the 1st Respondent did not give him a fair hearing when it directed him to surrender his firearm. The Petitioner further states that his letter explaining why he could not present himself for vetting was ignored by the 1st Respondent, and no reasonable grounds were given in the decision to have his firearm handed over to the police and his licence withdrawn without any proper hearing and that the said decision was made without any legal authority.

6.The Petitioner prays for an order directing the Respondents jointly and severally to give and or handover back to the Petitioner the firearm herein being S/A Pistol Serial No. RYK 831.

7.The Petition is supported by the affidavit of the Petitioner sworn on 5/11/2019.

The Response

8. The Respondents opposed the Petition vide Replying Affidavit sworn on 4/3/2020 by **Charles M. Mukindia** who is the Chairman of the 1st Respondent. The deponent avers that sometime in November 2018 vide a press statement, all gun holders were invited to their offices for

mandatory vetting exercise carried out countrywide. Despite the said invitation, the Petitioner failed to attend the vetting exercise within the stipulated period and neither did he give any explanation as to why he was not able to attend the vetting exercise.

9. The 1st Respondent avers that upon expiry of the requisite period, the Petitioner requested to be vetted stating that he was unwell during the official vetting exercise. However, the Petitioner's allegations of being unwell were not supported by any medical evidence.

Submissions

10. **Mr. Magolo** learned counsel for the Petitioner reiterated the contents of Affidavit Supporting to the Petition and submitted that the Petitioner has not committed any crime or conducted himself in a manner inconsistent with the requirements or terms indicated on his licence. Therefore, the Petitioner having not breached any condition, and a further vetting not being a condition attached to the holding of the firearm licence, the withdrawal of his firearm infringes his right to personal security and to do business in a secure environment.

11. Counsel further submitted that the Petitioner acquired his firearm at his own cost and by failing to give him a fair hearing before the Fire Licensing Board, the Petitioner's right to own property, and right to a fair hearing have been infringed. Counsel submitted that requiring the surrender of the subject firearm to the nearest police station amounted to revoking the Petitioner's licence through the back door since the letter from the 1st Respondent did not mention that the Petitioner had failed to comply with any requirement under the Firearms Act. **Mr. Magolo** submitted that Section 5(7) of the Firearms Act provides the various ways a firearm certificate may be revoked by a licensing officer. The Petitioner has not violated any of those ways.

12. **Ms. Waswa** learned counsel for the Attorney General reiterated the contents of the 1st Respondent's Replying Affidavit and urged the Court to dismiss the Petition with costs.

Determination

13. I have carefully considered the Petition, the rival affidavits, and submissions, together with case law. In my view, the following issues arise for determination.

a. Whether due process was followed before the petitioner's firearm was withdrawn.

b. Whether the Petitioner is entitled to the relief sought

a. Whether due process was followed before the Petitioner's firearm was withdrawn.

14. It is not in dispute that the Petitioner did not present himself to the 1st Respondent during the mandatory vetting exercise, and that after the expiry of the vetting exercise, vide letter dated 30/8/2019, the Petitioner belatedly sought to be vetted for reason that he had been bedridden and as a result he could not make it to the vetting within the vetting duration. It is also noteworthy that the 1st Respondent acknowledged receipt of the Petitioner's letter dated 30/8/2019. However, the Petitioner's request was declined for reason that the cited reasons in the Petitioner's letter were not sufficient to warrant his vetting after the vetting period had expired.

15. The question to be answered in this regard is whether, in light of the scope of powers and duties given to the 1st Respondent under the **Firearms Act** and the law, the power to order the Petitioner to deposit the firearm in his possession and ammunitions to the nearest police station amounted to a constructive revocation of the Petitioner's firearms certificate.

16. The functions of the 1st Respondent's board are provided for under section 3(5) of the Firearms Act as follows:

“(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 issued 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 centralized record management system under this Act;**
- (f) perform such other functions as the Cabinet Secretary may prescribe from time to time.”**

17. It is notable that under Section 3(5)(f), the Cabinet Secretary is given the powers to prescribe additional duties to the 1st Respondent, and therefore to this extent the directions given by the Cabinet Secretary for the Ministry of Interior and Coordination of National Government to vet civilian firearm holders were lawful.

18. The circumstances when a Firearms Certificate may be revoked are provided under Section 5(7) of the **Firearms Act**, Cap 114 of the Laws of Kenya as follows:

“(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.”

19. It can be discerned from the provisions of Section 5(7) of the Act, that while the 1st Respondent’s Board has power to revoke a Firearms Certificate, it is imperative that the exercise of that power by the 1st Respondent is done judiciously after the Board is satisfied that the holder is prohibited under the Act, or has failed to comply with a notice requiring the delivery of the firearm certificate.

20. The letter dated 11/9/2029 from the 1st Respondent neither gave the reasons why they required the Petitioner to deposit the firearm and ammunition to the nearest police station nor anchored their decision under the provisions of Section 5(7) of the Act.

21. From the foregoing, this Court finds and holds that the reasons the 1st Respondent cited for advising the Petitioner to deposit his firearm and ammunition to the nearest police station amounted to constructive revocation of the Petitioner’s Firearm certificate and licence contrary to the provisions of Section 5(7) of the Act. To this extent, the Court finds and holds that the 1st Respondent’s decision was *ultra vires* and illegal exercise of the powers in Section 5(7) of the Firearms Act.

22. The 1st Respondent Board being a public body has a duty bestowed by law upon it to adhere to the provisions of Article 47 of the Constitution. Article 47 stipulates 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.”

23. Additionally, Section 4 (3) and (4) of the Fair Administrative Action Act, which was enacted to implement Article 47, lays down the procedure to be adopted by State Officials when taking administrative actions as follows:

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

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

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

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

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

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

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

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

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

24. In this Petition, it is clear that the Fair Administrative Action Act was not complied with. There is no evidence that the Petitioner was given a notice informing him of his right to review or internal appeal against the 1st Respondent’s decision, and a statement of reasons informing the 1st Respondent’s decision. Consequently, this Court finds and holds that there was procedural impropriety and unfairness on the part of the 1st Respondent since it failed to observe the requirements of Article 47 of the Constitution and apply the provisions of the Fair Administrative Act in arriving at the impugned decision.

b. *Whether the Petitioner is entitled to the relief sought*

25. The Court of Appeal in **LTI Kisii Safari Inns Ltd & 2 others vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR** held as follows on the issue of a wrong being without a remedy...

“It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a Court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go unredressed if it is capable of being remedied by Courts of justice. See Snell’s Equity 23rd Edn page 28.”

26. Although this Petition suffers from poor drafting and failure to articulate the relevant remedies including those of *Certiorari* and *Mandamus*, it is my view that this Court as a Court of equity and in exercise of its jurisdiction under Article 23(3) is able to fashion a remedy that would be appropriate in the circumstances of this case. Consequently, the impugned decision in the 1st Respondent’s letter dated 11/9/2019 is hereby quashed, and the Petitioner is returned to the status he was in before the said decision. However, the Petitioner will have to be vetted as per the directives of the 1st Respondent

27. Consequently, this Court directs the 1st Respondent to consider the Petitioner’s renewal of the firearm licence which expired on 13/3/2020 while being at liberty to subject the Petitioner to the mandatory vetting in accordance to the factors enumerated under Section 5 of the Firearms Act.

28. The upshot of the above is that, this Court finds that the Petition dated 5/11/2019, is merited, and accordingly orders as follows:

(a) An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing and to quash the decision of the 1st Respondent contained in letter dated 11/9/2019 withdrawing and repossessing petitioner’s firearm certificate No. 00xxxx and confiscating his firearm S/A Pistol Serial No. BRYK831.

(b) An order be and is hereby issued directing the Respondents, their agents and or servants to consider the Petitioner’s renewal of the firearm licence which expired on 13/3/2020 taking into consideration the factors enumerated under Section 5 of the Firearms Act.

(c) There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF MARCH, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Makuto holding brief Wasuna for Respondent

Mr. Paul Magolo for Petitioner

Ms. Peris Court Assistant