



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 41 OF 2019

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF SECTION 7 OF THE FAIR ADMINISTRATIVE ACTION ACT (ACT NO. 4 OF 2015)

BETWEEN

STANLEY THIONG'O NDUATI.....APPLICANT

AND

THE SECRETARY FIREARMS LICENCING BOARD.....1ST RESPONDENT

THE FIREARMS LICENSING BOARD.....2ND RESPONDENT

AND

THE ATTORNEY GENERAL.....INTERESTED PARTY

JUDGMENT

Introduction.

1. The *ex parte* Applicant herein, Stanley Thiongó Nduati (hereinafter “the Applicant”) is an Advocate of this Court, and was holder of a Firearms Certificate No. 003576, which he states was first issued to him in 2005, and later re-issued on 7th November 2017. The Applicant claims that the said certificate was renewed on 6th November 2018 for one year until 6th November 2019. That on 5th December 2019, the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, issued a press statement directing that all civilian holders of firearms certificates undergo mandatory vetting before the Firearm Licensing Board, which is the 2nd Respondent herein. The said 2nd Respondent is a statutory body created under the provisions of section 3(1) of the Firearms Act.

2. The Applicant accordingly availed himself at the vetting venue on 11th February 2019 with his firearms certificate, firearm and ammunitions, and averred that, he was attended to by one Mr. David Kahinga, a member of the 2nd Respondent’s Board, who had the Applicant’s file in his possession. The Applicant further averred that he duly completed the Firearms Licensing Details form, and handed it to Mr. David Kahinga together with his firearms certificate and firearms.

3. According to the Applicant, the said Mr. David Kahinga indicated that he could not locate the grant of firearm approval form and other undisclosed fundamental documents, which are kept by the 2nd Respondent on initial application for a firearm certificate, on the Applicant’s file. That, Mr. Kahinga then informed the Applicant that the Applicant’s firearm license had been withdrawn, and proceeded to repossess the Applicant’s firearm certificate, firearm, magazine and 14 rounds of ammunition. Further, that Mr. Kahinga endorsed the confiscation on the Firearms Licensing Details form that the Applicant had completed during the vetting, and on Form 18 of the Firearms Act.

4. The Applicant subsequently moved this Court for leave to commence judicial review proceedings against the Respondents, which leave was granted by this Court on 20th February 2019. The Applicant thereupon filed an application by way of a Notice of Motion dated 4th March 2019, seeking the following orders:

a) That an Order of Certiorari do issue to remove into the High Court and to quash the decision of the Respondents contained in the Firearms Licensing Details Form dated 11.02.2019, withdrawing and repossessing the Applicant's firearm certificate No. 003576 and confiscating his firearm Ceska (CZ) Pistol 75D Serial No. B2940, one magazine and 14 rounds of ammunition.

b) That an Order of Mandamus do issue against the Respondents to reinstate and return to the Applicant his current firearm certificate No. 003576 due to expire on 06.11.2019, his firearm Ceska (CZ) Pistol 75D Serial No. B2940, one magazine and 14 rounds of ammunition.

c) That the Respondents be condemned to bear the costs of this Application.

5. The Applicant has also sued the Secretary of the 2nd Respondent as the 1st Respondent herein. The Attorney General, who is the principal legal advisor to the Government of Kenya, is joined as an Interested Party.

6. The application was canvassed by way of written submissions. Mbugua Mureithi & Company Advocates, the advocates on record for the Applicant, filed submissions dated 28th November 2019. The Respondents' and Interested Party's submissions were dated 9th December 2019, and were filed by Munene F. Wanjohi, a State Counsel in the Office of the Attorney General. A summary of the parties' respective cases is as follows.

The Applicant's Case

7. The Application is supported by a Statutory Statement dated 19th February 2019, and a verifying affidavit sworn on even date by the Applicant. The Applicant also filed a further affidavit he swore on 30th September 2019. The Applicant contends that he has never infringed any conditions of the firearm certificate during the fourteen years that he has been a licensed firearm holder. It is his case that the conduct and decision of the 2nd Respondent's Board member were *ultra vires* and in breach of sections 5(4), (5) and 7(b) of the Firearms Act, and the Applicant's legitimate expectation that his firearm license would last its lifespan of up to 6th May 2019. It is averred that no single member of the 2nd Respondent's Board has the power(s) or authority to make the impugned decisions and take the said actions, which are a preserve of the full Board.

8. The Applicant contends that he directly invoked this Court's original and supervisory jurisdiction as he is unlikely to get justice through an appeal to the Cabinet Secretary for the Ministry of Interior and Coordination of National Government as provided under the Firearms Act, for reasons that the said Cabinet Secretary is the author of the original directions that gave rise to the impugned decision in question, and will literally sit as a judge in his own cause. The Applicant thus contends that the appeal process is not an effective, fair, accessible, efficient, sufficient and just remedy.

9. The Applicant in his further affidavit reiterated that he was attended to by only one member of the 2nd Respondent, one Mr. David Kahinga, and that the deponent of the 2nd Respondent's replying affidavit, Vincent Wahoro, neither attended the Applicant's vetting nor participated in the impugned decisions. Therefore, that the averments in the said replying affidavit are mere hearsay and untrue.

10. Further, that the 2nd Respondent neither informed the Applicant of any discrepancy in the process of issuance of his first firearm permit in 2005, nor was the Applicant given an opportunity to explain any such discrepancies. The Applicant contended that he politely stated to Mr. David Kahinga that only the 2nd Respondent, the custodian of his file, had an answer to the discrepancies. Further, that, in the event that there was poor record keeping on the 2nd Respondent's part, it would be unfair to penalize the Applicant for the same. Nevertheless, that Mr. David Kahinga still confiscated his firearm, ammunition and license.

11. The Applicant refuted the allegations that his application for a firearm certificate is dated 8th November 2006 and that he was first issued with a license on 8th November 2006. He contended that the alleged letter dated 1st November 2006 is a grant for him to purchase a firearm. He avers instead that his letter of application addressed to the Chief Licensing Officer, Centre Firearms Bureau is undated, and was written sometime in early 2005.

12. The Applicant averred that he was first issued with his first temporary firearm permits on 25th May 2005 under section 7(12) of the Firearms Act, which was endorsed on his brother's (David Njau Nduati's) previous firearm certificate No. 641. He added that he continued to possess a firearm on temporary firearm permits endorsed on his brother's license until 10th May 2010, when the firearms dealer executed the transfer, formally transferring the firearm to the Applicant effective from that date, which was long after he had been vetted. Hence, the Applicant refutes the allegation that he was granted a license within a short period without being vetted.

13. According to him, there is no allegation of him breaching any provisions of the Firearms Act, and the impugned decision is therefore unreasonable, *ultra vires* the Firearms Act, in violation of the rules of natural justice, and null and void.

The Respondents' and Interested Party's Case

14. In response to the instant Application, the Respondents and Interested Party jointly filed Grounds of Opposition, wherein it was contended that the instant Application is premature, has no merit and is based on a misconception of the law. Further, that the application offends the provisions of section 9 (2) of the Fair Administrative Actions Act and section 23 of the Firearms Act, and is an abuse of court process.

15. They also filed a replying affidavit sworn on 20th June 2019 by Vincent Wahoro, a Board member of the 2nd Respondent. It is his

avertment that the 2nd Respondent was created by the Firearms Act to license and regulate gun ownership by private citizens in the country. Further, that it was deemed necessary to undertake reforms to streamline the manner in which the 2nd Respondent conducts its activities to curb the increasing rate of gun related violence in the country, and that the Cabinet Secretary for the Ministry of Interior and Coordination of National Government accordingly issued a gazette notice requiring all firearm holders to appear before the 2nd Respondent for vetting, to determine their suitability and proficiency to hold the licenses. It is contended that the Applicant alongside other citizens appeared before the 2nd Respondent on 11th February 2019 and presented his firearm, a Ceska pistol serial No. B2940, a firearm licensing certificate No. 003576, and vetting forms.

16. It is deponed that, on perusing the records in the Applicant's file for verification of his documents, the 2nd Respondent noted certain discrepancies and irregularities in the Applicant's firearm certificate application. Further, that the 2nd Respondent sought an explanation regarding the said discrepancies and irregularities, but was instead met with insults and hostility from the Applicant. In addition, that when asked by the 2nd Respondent to furnish any other letter of grant allowing him to purchase the said firearm, the Applicant resorted to intimidation, asserting that he was an advocate of the High Court of Kenya and would have his way. That the Applicant also stated that the tenure of the 2nd Respondent's members was about to lapse, and he would deal with their successors.

17. It is averred that in the face of the said irregularities, the 2nd Respondent was duty bound to withdraw and confiscate the Applicant's firearm certificate, the firearm, a firearm's magazine and 14 rounds of ammunition. It was further averred that the Applicant had ample opportunity to explain the said irregularities but opted not to. Lastly, the Respondents and Interested Party contend that the instant Application offends section 23 of the Firearms Act and section 9(2) of the Fair Administrative Action Act. Therefore, that this Court lacks jurisdiction to hear the instant application, and should direct the Applicant to exhaust the remedies available under section 23 of the Firearms Act.

The Determination

Preliminary Issues

18. Two preliminary issues have been raised by the pleadings and submissions filed by the parties herein, that require to be addressed by this Court at the outset. Firstly, this Court's jurisdiction has been contested by the Respondents and Interested Party. Secondly, the Applicant has challenged the admissibility of certain parts of the Respondents' replying affidavit sworn on 20th June 2019 by Vincent Wahoro, and specifically the averments made in paragraphs 9 to 13 thereof, on account of the same being hearsay. I will therefore commence my determination with a consideration of the two preliminary issues.

On Jurisdiction

19. The Respondents and Interested Party in this regard submit that the Applicant has not exhausted the remedies available under the Firearms Act, hence should not be granted the orders sought. Citing section 23 of the Act, it is their submission that the Applicant has not lodged an appeal with the Minister, hence the instant application is barred by section 9(2) and (3) of the Fair Administrative Action Act, which provides for exhaustion of alternative remedies. It is their submission that the use of the word shall in Section 9(3) connotes the mandatory intention by the drafters.

20. In this regard, they extensively cited the case of **Republic vs Kenyatta University ex parte Ochieng' Orwa Domnick & 7 Others [2018] e KLR**, as well as the case of **Republic vs Firearms Licensing Board & Another ex parte Stephen Vincent Jobling [2019] e KLR**. According to the Respondents and Interested Party, the Applicant has not lodged an appeal with the Minister, and even if the appeal was not a viable option, he ought to have moved the Court for an exemption from the requirement, hence the instant application should fail.

21. The Applicant on his part submits that the question of jurisdiction does not arise, citing Article 165 (3)(a) and (6) of the Constitution on the original and supervisory jurisdiction of the High Court, and Article 47 which provides for the right to fair administrative action, which falls for determination under this Court, pursuant to Articles 23 and 165 (3)(b). On the question of not having utilized the administrative appeal process under section 23 of the Firearms Act and section 9(2) of the Fair Administrative Action Act, the Applicant submitted that this is a preliminary issue to be considered at the time of granting leave. That, the issue is presumed foreclosed since leave was already granted by the Court to file the substantive motion.

22. Further, that in any case, even if the question of exhaustion of remedies is still a live issue, the Applicant is unlikely to get an effective, fair, accessible, efficient and just remedy in an internal process where the Cabinet Secretary for the Ministry of Interior and Coordination of National Government will essentially sit as a judge in his own cause, in light of the fact that the impugned decisions were triggered by the said Cabinet Secretary's extra-legal statements. Accordingly, the Applicant cited the case of **Republic vs Secretary of the Firearm Licensing Board & 2 Others Ex-Parte Senator Muthama [2018] e KLR** for the above arguments. The Applicant also cited the case of **Republic vs Firearms Licensing Board & Another Ex-Parte Boniface Mwaure [2019] e KLR** for the position that a reasonable apprehension of bias is sufficient reason for exemption of exhaustion of remedies, and that it is not mandatory to exhaust the administrative appeal process under section 23 of the Firearms Act before one can approach this Court for judicial review.

23. I have considered the arguments made by the parties on the issue of this Court's jurisdiction, and note that Article 165 (6) of the Constitution provides that the High Court has supervisory jurisdiction over the subordinate courts, and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked to review the lawfulness of the 1st and 2nd Respondents' actions and decisions, in exercise of its supervisory jurisdiction.

24. Therefore, this is a case where this Court would ordinarily have jurisdiction, were it not for the issue raised by the Respondents and Interested Party about exhaustion of internal dispute resolution mechanisms, and in particular that the Applicant ought to have appealed the decision of the 2nd Respondent to the Minister as provided for under section 23 of the Firearms Act. The said section states as follows:

“(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.”

25. The Respondents and Interested Party have also relied on section 9(2) (3) and (4) of the Fair Administrative Action Act which provide as follows:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

26. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act and under Article 159(2)(c) of the Constitution, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. However, the Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstances. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in Speaker of National Assembly vs Karume (supra) in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

27. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra) as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

28. The Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. Section 9(4) of the Fair Administrative Action Act however suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy.

29. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in R vs National Environmental Management Authority (2011) eKLR as follows:

“.. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

30. The question therefore to be asked is whether valid grounds have been demonstrated that allow the Applicant to by-pass the procedure set out in section 23 of the Firearms Act. In this regard, I note that the first reason given by the Applicant is that the alternative mechanisms were

considered by the Court at the time of granting leave. The Applicant relied on a finding to this effect made in **Republic vs Secretary of the Firearm Licensing Board & 2 Others Ex-Parte Senator Johnson Muthama [supra]**, I find that there was a detailed ruling delivered on the issue of leave to commence judicial proceedings in that case, unlike in the present application, which also addressed the possibility of the applicant therein getting justice from the Government officials. No such consideration has been made by this court, and this ground cannot therefore lie in the present application.

31. The second reason given by the Applicant was the perceived bias by the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, as evidenced by the press statement he issued before the impugned decision was made. The Applicant annexed a copy of the press statement by the said Cabinet Secretary on the verification of firearm certificates by the 2nd Respondent and the reasons therefor. The issue of the said press statement by the Cabinet Secretary is also not disputed by the Respondents. It is my view that the absence or otherwise of bias is a legitimate concern when considering the question whether an alternative remedy is accessible and effective, as the Constitution in Article 50(1) on the right to a fair hearing expressly provides that a dispute is required to be resolved by an independent and impartial tribunal or body.

32. A likelihood or apprehension of bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she will be biased. The test to be applied in determining whether there is a likelihood of bias was stated in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134** by Lakha, JA as follows: -

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

33. The test for apprehension of partiality or bias for decision makers was also set out in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR**, where the Supreme Court stated that disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias, if a reasonable man would reasonably suspect bias. M.K.Ibrahim JSC expressed himself as follows;

"The court has to address its mind to the question is whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible"

34. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the Applicant was made, and having considered the facts, would conclude that there was a possibility that the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, who is the relevant Minister in section 23 of the Firearms Act, may be biased. I find the answer to be in the positive in light of the averments made by the said Cabinet Secretary in the subject press statement, which showed that he had already formed an opinion on the subject matter of the impugned decision. In particular, the Cabinet Secretary stated as follows in the said press statement:

"...Effective December 17, 2018 the Board will begin a 90 day rigorous verification exercise of all firearms certificates in the country in full exercise of its reasonable discretion and mandate. The board will also establish, maintain and monitor a centralised electronic register of all private citizens holding firearms.

In this light:

1. All civilian firearm holders must appear in person before the firearm licensing board (FLB) for mandatory vetting with a view to certifying their sustainability to own guns. They must also avail their weapons for review and certificates for authentication. Upon qualification, they will be issued with new smart licenses

2. Anyone in illegal possession of any firearm must surrender it to the government within the 90 day moratorium failure to which they will be met with the full force of the law

3. Any civilian in possession of any prohibited firearm must surrender it to the government within this period notwithstanding the authenticity of the licence prohibited firearms range from automatic/semi-automatic self-loading military assault rifles to guns that fail outside the functioning cycle described in the Firearms Act. They include G3, AK-47, M16 rifle, Uzi, Sterling-patchett MK5, CZ, Scorpion Evo 3, and MP5 among others. If in doubt about a specific weapon, the holder should seek advise from the nearest police station before the expiry of the respite period.

4. All preferential certifications and special; considerations that might have been accorded earlier for specific civilian firearms holders under whichever circumstances are hereby abrogated with an immediate effect. "

35. It is evident from the said statements that the Cabinet Secretary had already made certain decision as regards civilian firearms holders. While the Cabinet Secretary may have the power to give the directions in the press statement, it would be contrary to the requirements of a fair hearing and principles of natural justice for the Cabinet Secretary to thereafter sit in judgment over disputes arising from the subject matter of the same directions. It is thus my finding that for this reason that the alternative mechanism of an appeal to the same Cabinet

Secretary is not an effective and fair remedy for the Applicant, and the exception in section 9(4) of the Fair Administrative Action Act therefore applies.

36. In this respect, I find that while a formal application to be exempt from the provisions of section 9(2) to (4) of the Fair Administrative Action Act is advisable, it will in the circumstances of this application not only cause unnecessary and undue delay to these proceedings, but will also not add any substantive value, as the relevant factors have already been canvassed by the parties, and considered by this Court. This Court also has discretion under Article 159 of the Constitution and section 3A of the Civil Procedure Act to make such orders as are necessary to achieve substantive justice, and not to give undue regard to procedural technicalities in the process. This application is thus found to be properly before this Court.

On the Admissibility of the Respondents' Affidavit

37. The Applicant reiterated in this regard that he was interviewed by a single member of the 2nd Respondent, which is not disputed in the 2nd Respondent's replying affidavit sworn by Vincent Wahoro. Further, that the said deponent does not aver that he attended to the Applicant. It is thus submitted that his replying affidavit is hearsay, hence inadmissible. The Applicant cited the case of **Republic vs Otieno Kajwang & Another Ex-Parte Mohamud Muhumed Sirat [2009] e KLR** for the submission that the rule of hearsay applies to evidence as well as documents.

38. The Respondents and Interested Party did not address this issue in their submissions. It is in this regard notable that under section 2(2) of the Evidence Act, the rules of evidence also apply to affidavits. In addition, *Order 19 Rule 3 of the Civil Procedure Rules* requires that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. This rule provides as follows:

“(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

39. In this respect, I am in agreement with, and adopt the holding by Odunga J. in **Republic v Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited [2015] e KLR** on the application of Order 19 Rule 3 to judicial review proceedings. The learned Judge held as follows:

“12. However, the East African Court of Appeal in Life Insurance Corporation of India vs. Panesar [1967] EA 614 (Sir Charles Newbold, P) dealing with the application of the Order to matters falling outside the *Civil Procedure Act* pronounced itself as hereunder:

“Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless. That the provisions of the Evidence Act do not apply to affidavits or to arbitration proceedings does not therefore mean that there exist no rules as to what may be set out in the affidavits, other than rule 3 of Order 18, or as to what evidence may be led before an arbitrator. To accept that would be to substitute chaos for order and to permit of any sort of evidence being placed before a court or an arbitrator as probative of the fact sought to be proved. Such an astounding position would require the highest authority before...I would accept it...the proposition is so manifestly wrong that no one has had the temerity in the past to advance it. The very provisions of Order 18 rule 3(1), which permit in certain applications statements in affidavits to be based on belief thus relaxing in those circumstances the hearsay rule, shows that rule 3 is based upon the assumption that the normal rules of evidence apply to affidavits. Were it otherwise rule 3 would be a classic example of straining at a gnat but swallowing the camel. Even in relation to rule 3 the court has laid down certain requirements so as to ensure that the relaxation of the hearsay rule is kept within very close confines and that the courts are not asked to act upon evidence which experience has shown to be valueless of any fact...It is clear that the court, even where there is a specific statutory exception to the hearsay rule in evidence tendered by affidavit, will not accept the affidavit as probative of the fact sought to be proved unless there is set out precisely which are the facts based on information and the source of that information. To suggest that the court would have adopted that position if no rules of evidence applied to what could be set out in affidavits is manifestly absurd. Whereas it is true that the Evidence Act does not apply to affidavits tendered to the court, it is also true that the basic rules of evidence nevertheless apply to evidence tendered by affidavit and if those basic rules are not complied with then the evidence is of no probative value whatsoever and should be rejected. It is important to observe that unless there is a specific provision excepting the rule, the contents of affidavits must be confined to such matters as are admissible by the rules of evidence. Unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence instead of oral evidence is destroyed at a blow.”

13. It is therefore my view that the principles under Order 19 of the *Civil Procedure Rules* apply to affidavits filed in applications under Order 53 of the *Civil Procedure Rules* as well.

40. In the present application, I note that Vincent Wahoro, the deponent of the impugned affidavit sworn on 20th June 2019, stated therein that “he is a Board member of the Firearms Licensing Board and hence competent and lawfully authorized to swear the affidavit”. I also note that the Applicant has sued the said Board as the 2nd Respondent herein, and has not sued any of the members in their individual capacity. Lastly, I note that the Applicant does not dispute that the said deponent is a member of the Board. What he disputes is that the said deponent was not the member of the 2nd Respondent Board who dealt with him.

41. I am of the view that in the circumstances, as the deponent is a member of the 2nd Respondent, and his authority to swear the affidavit on

behalf of the 2nd Respondent has not been disputed, the matters deponed therein are matter which were in his knowledge as a member of the said Board. For the same reasons, the evidence in the affidavit cannot be regarded as hearsay evidence, as it come to the knowledge of the deponent as a member of the 2nd Respondent, and is therefore direct evidence within the meaning of section 63 of the Evidence Act. It is also notable that the impugned paragraphs of the affidavit refer to actions undertaken and discrepancies noted by the 2nd Respondent, which is a collective entity made up of many members. I therefore decline the invitation to strike out the impugned paragraphs of the affidavit, or render them inadmissible for the foregoing reasons.

The Substantive Issues

42. This Court will therefore proceed to consider the three substantive issues raised in this application, which are firstly, whether the 2nd Respondent's decision to withdraw the Applicant's firearm certificate and firearm was lawful; secondly, whether the said decision is reasonable; and lastly, whether the remedies sought are merited.

43. Before embarking on a consideration of these issues, it is necessary to reiterate the grounds for judicial review as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others**, (2008) 2 EA 300 at pages 303 to 304 thus:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

44. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited**, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

45. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others**, (2016) KLR that *Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator or make the orders stipulated in Section 11 of the Act.*

On Whether the 2nd Respondent's Decision is Lawful

46. In making the case that the impugned decision is *ultra vires* the Firearms Act, the Applicant reiterated that the decision was as a result of the directive on mass vetting by the Cabinet Secretary for Interior which had no legal basis. Further that the directive was not gazetted, contrary to the averments in the replying affidavit, as no such gazette notice is annexed. Therefore, that the vetting exercise that the Applicant was subjected was in itself arbitrary, extra-legal, and *ultra-vires* the Firearms Act, and everything done on that occasion is null and void.

47. The Applicant also submitted that the process of revocation of a firearm certificate is individualized and not an en mass affair as directed by the Cabinet Secretary for the Ministry of Interior and Coordination of National Government. In this regard the Applicant cited section 5(7) of the Firearms Act which he submitted provides for a personalized process of revoking a firearm, and contended that the process leading to the withdrawal of his firearm was not pegged on this section. Hence, the same is arbitrary, *ultra vires* and null and void *an initio*. Further, that the impugned decision was made by one member of the 2nd Respondent, David Kahinga, and not the 2nd Respondent as a Board, as envisioned under section 3 of the Firearms Act.

48. According to the Applicant, where a statute confers power on a Board such power can only be exercised by the Board properly

constituted as such and by a majority of its members. That, since section 3 of the Firearms Act creates the Respondent as an eight-member Board, quorum would require at least 5 members. Section 55 of the Interpretation and General Provisions Act was cited in this regard thus: “*save as is otherwise expressly provided by written law, where an act or thing may or is required to be done by more than two persons, a majority of them may do it.*”

49. It is also submitted that the Respondents and the Interested Party did not demonstrate by evidence how the impugned decision was made by the 2nd Respondent sitting as a Board; and no minutes were availed nor any evidence of the members of the 2nd Respondent convening and arriving at the impugned decision. Reference was made to the cases of **Republic vs Firearms Licensing Board & Another Ex-Parte Boniface Mwaura [supra]** and **Republic vs Medical Practitioners and Dentists Board Ex-Parte Kenyatta National Hospital Board & Another [2017] e KLR** for this position.

50. The Applicant contended that other than the press statement, the 2nd Respondent did not send any notice to the Applicant for the impugned decision, and that instead, the said withdrawal and confiscation was done on the spot. In this regard, section 5(7) was cited, for the position that the revocation of a firearms certificate is pegged on a failure to comply with a notice duly issued to the license holder by the 2nd Respondent. Further, *that in the event, which is not the case, that discrepancies were detected in the acquisition of his firearm fourteen (14) years ago, it has not been demonstrated that he was notified of the same or any opportunity to address the issue. On the contrary, it is admitted in the replying affidavit that the said firearm was withdrawn on the spot. Therefore, the Applicant submits that his right to fair administrative action as envisaged under Article 47 of the Constitution was abandoned.*

51. According to the Applicant, the reasons given for the withdrawal of the Applicant’s license have no bearing on section 5(7) of the Firearms Act, that even if there were issues in the Applicant’s file kept by the 2nd Respondent, which he denied, it has not been demonstrated that he was accorded a fair hearing or adequate opportunity to respond to the inverted accusation. He cited the decision in **Republic vs Secretary of the Firearm Licensing Board & 2 Others Ex-Parte Senator Johnson Muthama [supra]** in this regard. Lastly, the Applicant submitted that the issue of record keeping was a cause of the 2nd Respondent which could not be blamed on the Applicant.

52. The Respondents and Interested Party’s submissions on this issue were *that* the Respondents are mandated by law under the Firearms Act to license and regulate gun ownership by private citizens in the country. That, the Ministry of Interior and Co-ordination of National Government within which the Respondents fall, is tasked with management of internal security affairs, small arms and light weapons. It is submitted that the Cabinet Secretary for the Ministry of Interior and Coordination of National Government, in light of this, issued a Gazette Notice requiring all firearm holders to undergo vetting to determine their suitability and proficiency to hold the said licenses. That, upon being vetted, the Applicant’s license was cancelled after the Respondent noted some anomalies.

53. It was further submitted that courts ought not to be used to curtail the statutory duties of statutory bodies. Accordingly, the Respondents and Interested Party cited the case of **Republic v Kenya Revenue Authority Ex Parte Yaya Towers Limited [2008] e KLR** for the position that the remedy of judicial review is not concerned with reviewing the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.

54. The question to be answered in this regard is whether, in light of the scope of powers and duties given to the 1st and 2nd Respondents under the Firearms Act and the law, they incorrectly interpreted a statutory provision as giving them power, or purported to exercise a power they did not possess in revoking the Applicant’s firearms certificate. It is in this respect not disputed that the 2nd Respondent did confiscate the Applicant’s firearm certificate and firearm on 11th February 2019, when the Applicant appeared before it for vetting, as directed by the Cabinet Secretary for Interior and Coordination of National Government.

55. The 2nd Respondent’s functions are in this regard provided for under section 3(5) of the Firearms Act in 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.”

56. It is notable that under section 3(5)(f), the Cabinet Secretary is given the powers to prescribe additional duties to the 2nd 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. It is reiterated however, that despite this finding, and as found by this Court in the foregoing, the said directions also precluded the said Cabinet Secretary from sitting on appeal of this decision.

57. Section 5(7) of the Firearms Act on the other hand provides for the circumstances when a Firearms Certificate may be revoked 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 unfit 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.”

58. It is evident from the provisions of section 5(7) that while the Respondent has power to revoke a Firearms Certificate, there is a statutory pre-condition to the exercise of that power, which is that the Respondent can only revoke after being satisfied that the holder is prohibited under the Act, or has failed to comply with a notice requiring the delivery of the firearm certificate. As held by this Court in **Republic vs Secretary of the Firearm Licensing Board & 2 Others Ex-Parte Senator Johnson Muthama** [supra] :

“42. In this respect where there is existence of a statutory precondition as to the exercise of a power, this Court as a judicial review Court will interfere with that exercise, if the challenge is as to whether or not the precondition was satisfied, and/or that there was a wrong finding made by the public body in this regard. Such a factual precondition is what is also known as a precedent fact, and the Court in judicial review proceedings will interrogate a conclusion made as to the existence or otherwise of such a precedent fact.

43. For example, in **R v Secretary of State for the Home Department, ex parte Khawaja** [1984] AC 74, the House of Lords held that the question whether the applicants were "illegal immigrants" was a question of fact that had to be positively proved by the Home Secretary before he could use the power to expel them. The power depended on them being "illegal immigrants" and any error in relation to that fact took the Home Secretary outside his jurisdiction to expel them.”

59. It is notable in this regard that section 5(7) requires the 1st Respondent to be satisfied about the existence of these circumstances. The reasons given by the 2nd Respondent in its replying affidavit as regards why the Applicant’s firearm certificate and firearm were withdrawn are as follows:

“7. That the Applicant herein together with other citizens appeared before the 2nd Respondent on 11th February 2019 at the police Pavilion South C and presented his firearm; a Ceska pistol, serial No. B2940, a firearm certificate No. 003576 and vetting forms.

8. That the 2nd Respondent then undertook a perusal of the records on the Applicant’s file to confirm the veracity of his documents.

9. That certain discrepancies were noted from the onset including the following:

a. The Applicant’ firearm certificate application was dated 8th November, 2006 while his letter granting him the right to purchase the firearm is dated 1st November, 2006 which is seven days before he had even lodged an application to be granted such right.. (Attached and marked DK1 is the firearm certificate application and attached and marked DDK2 is the letter of grant)

b. Our records also revealed that the firearms dealer from which he purchased his firearm disclosed that the firearm certificate was issued on 8th November 2006; the same date he had lodged his application for the same.

This was highly irregular as it is inconceivable that that application had gone for the requisite vetting processes from the police, the Directorate of Criminal Investigations and the 2nd Respondent herein within the same day. (Attached and marked DK3 is the correspondence from the firearms dealer)

c. The prescribed period of six months from the date of the issue of grant to th date of purchasing a firearm had lapsed and he was in the circumstances required to have presented himself for fresh vetting.”

60. The 2nd Respondent then went on to aver that light of the irregularities cited, it was duty bound to withdraw the Applicant’s firearm certificate, confiscate the said certificate, the firearm, a firearm’s magazine and 14 rounds of ammunition. The reasons it cites for withdrawing the Applicant’s firearm certificate and firearm are however not included in the provisions of the law cited in the foregoing on the circumstances when a firearm certificate may be revoked, and were therefore not legal. To this extent I find that the 2nd Respondent’s decision was *ultra vires* and unlawful. In addition, no evidence was given of any prior notice having been issued to the Applicant on the withdrawal of his firearm certificate and firearm contrary to the express provisions of section 5(7). There was thus an illegal exercise of the powers in section 5(7) of the Firearms Act by the 2nd Respondent.

61. In addition to the duty bestowed by law upon the 1st and 2nd Respondents to comply with the express provisions of the Firearms Act, the said Respondents are also now required to act fairly, which is a constitutional imperative under Article 47 of the Constitution. Article 47 provides as follows in this regard:

(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.

62. 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 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.”

63. In the present application, it is not disputed that the decision to revoke the Applicant’s firearms certificate and confiscate his firearm was made on the day the Applicant presented himself for vetting. The 2nd Respondent did not provide any evidence of the notice or request it states it made to the Applicant to explain the discrepancies that were noted in the Applicant’s application. In any event, given that it is not in dispute that the said discrepancies were alleged to have been noted on the same day the Applicant’s certificate and firearm were withdrawn, which was 11th February 2019, it is evident that the Applicant was not given an opportunity to state his case as regards the said revocation.

64. The 1st and 2nd Respondents were in this respect bound to observe the requirements of Article 47 of the Constitution and apply the provisions of the Fair Administrative Act, and did not provide any evidence to show that these requirements and provisions were complied with before making the impugned decision. This Court therefore finds that for these reasons, there was procedural impropriety and unfairness on the part of the 1st and 2nd Respondents.

On Whether the 2nd Respondent’s decision was Reasonable

65. The Applicant in this respect submitted that it is clear from the record that the 2nd Respondent did not level any accusations against him on breach of any conditions of the firearms license or any wrong doing. Further, that the reasons given by the 2nd Respondent for withdrawal of the Applicant’s firearm certificate and firearm did not fall under sections 5(7) of the Firearms Act. The Applicant reiterates that the reasons touched on record keeping which is the 2nd Respondent’s responsibility. Hence, the 2nd Respondent, by way of the impugned decision, is blaming the Applicant for its own failure of duty. The Applicant terms a decision based on such reasoning as capricious, irrational, illogical and *Wednesbury* unreasonable.

66. It is also submitted that by shifting blame on the Applicant, the 2nd Respondent deprived the Applicant of the presumption that the license was duly issued. Subsequently, that this robbed him of the legitimate expectation that his license would be renewed as provided by section 5(4) of the Firearms Act. The decision in **Republic v Firearms Licensing Board & 3 Others Ex-Parte Julius Okeyo Owidi [2018] e KLR** was cited for the holding that after issuance of a firearms certificate, 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.

67. It has long been established that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense that it is a decision which no public body acting unreasonably would have reached. The two terms “irrational” and “unreasonable” are used interchangeably in this regard, after they were each used in two decisions namely **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374** to illustrate an unreasonable decision. These terms were also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)**, and are interchangeably used to describe cases where the nature of the outcome of a decision is not acceptable for established reasons, or where there are flaws in the process of reasoning used to arrive at the decision.

68. This Court has already found that the reasons given by the 2nd Respondent for the withdrawal of the Applicant's firearm certificate and firearm were not supported by the law, and to this extent it is the finding of the Court that the decision it made on 11th February 2019 was also unreasonable.

On whether Remedies sought are Merited

69. The last issue is as regards the merits of the remedies sought by the Applicant, which are orders of the orders of certiorari and mandamus. It was in this regard submitted by the Respondents and Interested Party that the prayer by the Applicant that the Court compels the Respondents to reinstate and return his current firearms certificate is overtaken by events, as the same expired on 6th November 2019. Hence, the prayer cannot be granted, even if the license was issued regularly, since it has expired.

70. The Court of Appeal held in ***Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge, (1997) e KLR inter alia*** as follows as regards the orders of certiorari and mandamus:

“...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 compel 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. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”

71. In applying these principles, I find that as the 2nd Respondent has been found to have acted *ultra vires* the Firearms Act, and unfairly in contravention of Article 47 of the Constitution and the provisions of the Fair Administrative Action Act when making the impugned decision on 11th February 2019, the Applicant is entitled to the order sought of certiorari to quash the said decision.

72. Furthermore, the result of quashing the impugned decision will be to revert the Applicant to the status he was before the said decision. This status was that he had a valid firearm certificate which had not expired. It is also notable that the 2nd Respondent was under a duty to act in accordance with the provisions of the Constitution and Firearms Act in relation to any withdrawal or revocation of the Applicant's firearms certificate and firearm, and did not do so, as has been found in this judgment. To this extent, the order of mandamus is also merited.

73. In the premises this Court finds that the Applicant's Notice of Motion dated 4th March 2019, is merited, and accordingly orders as follows:

I. 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 2nd Respondent contained in the Firearms Licensing Details Form dated 11th February 2019 withdrawing and repossessing the Applicant's firearm certificate No. 003576 and confiscating his firearm Ceska (CZ) Pistol 75D Serial No. B2940, one magazine and 14 rounds of ammunition.

II. An Order of Mandamus be and is hereby issued against the Respondents to reinstate and return to the Applicant a current firearm certificate No. 003576, his firearm Ceska (CZ) Pistol 75D Serial No. B2940, one magazine and 14 rounds of ammunition.

III. The 1st and 2nd Respondents shall meet the Applicant's costs of the Notice of Motion dated 4th March 2019.

74. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2020

P. NYAMWEYA

JUDGE