REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC APPLICATION NO. 47 OF 2018

In the matter of an application by Boniface Mwaura for orders of *Certiorari*

and

In the matter of and/or the violation of Articles 1, 2, 10, 23, 24, 27, 29, 40, 47, 50 of the Constitution of Kenya, 2010

and

In the matter of the Firearms Act, Chapter 114, Laws of Kenya

and

In the matter of Fair Administrative Action Act

and

In the matter of sections 8 and 9 of the Law Reform Act, Chapter 26, Laws of Kenya

and

In the matter of order 53 of the Civil Procedure Rules, 2010

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

FIREARMS LICENSING BOARD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

BONIFACE MWAURA.....*EX PARTE* APPLICANT

JUDGMENT

The relief sought.

1. Pursuant to this courts leave granted on **6th** February 2018, by a Notice of Motion dated **12th** February 2018, the ex parte applicant seeks an order of Certiorari to quash the first Respondent's summons to him to surrender his licensed firearm to its officers as communicated through its Chief Licensing Officer.

Factual matrix.

2. The facts giving rise to the application are enumerated in the application seeking leave, the statutory statement and the verifying Affidavit annexed thereto. Briefly, the ex parte Applicant avers that he is a law abiding citizen, and, that, he acquired firearms legally. He avers that he duly applied for the licensing of the firearms and was issued with a firearm certificate on the **4th** July 2005 which was subsequently lawfully renewed every year.

3. He avers that the first Respondent, through its Chief Licensing Officer summoned him to its offices for the purposes of surrendering his firearms which are all duly licensed, which decision is arbitrary and unilateral. He states that his firearm certificate was issued on **4th** June 2005 after he satisfied all the requirements and the law, and, that, he has since renewed it annually, he at all times conducted himself in accordance with the provisions of the law.

Legal foundation of the application.

4. The ex parte applicant states that the said decision is illegal in that in arriving at the decision requiring him to surrender his firearms, the first Respondent did not adhere to the principles of good governance set out in Article **10** of the Constitution and the principles of fair administrative action as set out in Article **47** of the Constitution.

5. The ex parte applicant states that the process leading to the decision contravened the principles of good governance, and, that it was tainted with illegality, and, was, conducted in a manner that violates provisions of the law and defeats the principles of the Constitution and the right to fair administrative action. Additionally, the ex parte applicant states that he has a legitimate expectation that the Respondent shall at all times be guided by the law in executing its mandate.

6. Further, the ex parte applicant states that the Constitution requires that all state organs in the exercise of their powers to engage the public in an exercise of public participation, transparency and accountability. Additionally, he states that he was not served with a notice of the proposed action and reasons for the decision.

7. He also states that the decision is irrational and unreasonable on grounds that the decision lacks consideration of the fundamental freedoms and rights of the applicant guaranteed in the Constitution. Further, he states that the decision is irrational and unreasonable in that it was arrived at without following the due process of law, and, that, was never accorded an opportunity to make any representation on the decision, and, that, it was arrived at in an opaque and arbitrary manner.

8. Also, the ex parte applicant states that the first Respondent acted in bad faith and failed to uphold the principles of natural justice and violated the ex parte applicants right to legitimate expectation that the provisions of the Constitution and the Fair Administrative Action Act will be respected, and, while conducting its mandate, the first Respondent will be guided by the law.

9. The ex parte applicant further states that the decision violates Articles **10**, **27** and **47** of the Constitution and that the Respondent disregarded the ex parte applicants constitutional rights.

Respondents grounds of opposition.

10. The Respondents filed grounds of opposition on **30th** May 2018 citing four grounds, namely:- **(a)** that the application is fatally defective and incompetent for offending the mandatory provisions of order **53** Rule **7(1)** of the Civil Procedure Rules, 2010, in that, the ex parte applicant has not annexed the decision sought to be quashed; **(b)** that the ex parte applicant has not exhausted alternative remedies under the law and therefore has not met the requisite requirements for granting the Judicial Review Orders; **(c)** that no orders has been sought against the Attorney General; and, and, **(d)** that the application is frivolous, vexatious and an abuse of the court process.

Issues for determintion

11. Upon analyzing the respective facts presented by the parties and their advocates submissions, I find that the following issues fall for determination:-

> *a. Whether this suit is **Fatally Incompetent for Not Annexing the Decision the ex parte Applicant seeks to Be Quashed.***

12.

> ***a.** Whether this suit is **Fatally Incompetent for Not Annexing the Decision the ex parte Applicant seeks to Be Quashed.***

13. **Mr. Munene,** the Respondents' counsel in his grounds of opposition opposed this suit on grounds that it is fatally and incurably defective and incompetent for failing to annex the impugned decision. Building on this ground, **Mr. Munene** in his submissions called for the suoit to be dismissed for offending the provisions of Order **53** Rule **7(1)** of the Civil Procedure Rules, 2010 which provides that:-

> *7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.*

14. **Mr. Munene** argued that the rationale for the above provision is that the court must satisfy itself that the decision sought to be challenged

exists and that the contents of the decision need to be verified to decide whether the decision satisfies the grounds for Judicial Review. To buttress his argument he cited Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) [1] where the court of appeal held that:- "…The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed. We hold that the learned judge erred and it was not appropriate to issue the judicial review orders in this matter..."

*15. Additionally, **Mr. Munene** cited Zachary Onsongo National Police Service Commission & Another[2] where the High court stated:-*

> *16. "As rightly submitted by the 2nd respondent, applicants coming for judicial review before any superior court, must follow certain basic requirements for the Court to base its decision on. Where a party has opted to take the route of judicial review, seeking for orders of certiorari and prohibition against a decision that has already been taken and is also cited as the basis of approaching the court, then such a decision must be attached to the application for judicial review for the Court to assess the same and be able to order or direct as appropriate. It is not sufficient for a party to only cite that they have knowledge of a decision having been made. Or that they are aware that a particular public officer has issued a declaration in a non-specified place and time and then seek to challenge such a declaration. For the Court to base such a fluid decision to issue directions to a Respondent would be equivalent to chasing a loose goose in a wild field. That is not the purpose of the court, as to do so would be making orders and directions without certainty and not capable of enforcement. The challenged decision and the requirement to attach it in an application such as this one would serve this very important purpose – the Court would with certainty be able to appreciate the decision complained against."*

16. Counsel argued that the ex parte applicant invites the court to invalidate a decision the substance of which cannot be ascertained, hence, the application is based on speculation and cannot stand in law. Additionally, he argued that no decision has been made capable of being quashed.

17. The ex parte applicant's counsel, **Mr. Otieno's** counter argument was that the impugned decision was communicated orally by way of a telephone call, hence, there was no written communication. He added that the Respondents have not denied the existence of the decision. Further, he contended that the absence of the decision is curable under Article **159(2)(d)** of the Constitution. To forty his argument, he cited Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others[3]where a three judge bench refused to uphold a similar objection premised on Order 53 Rule 7 of the Civil Procedure Rules, 2010. In the said case, citing several decisions rendered by our superior courts the court rendered itself as follows:-

> *98. In our view the requirement that a decision be exhibited serves two purposes. **Firstly,** it is meant to confirm that a decision in actual fact exists and that the Court is not being asked to quash a non-existent decision. **Secondly**, it is meant to confirm whether the Applicant is within the statutory timelines prescribed for the purposes of an application for certiorari. Where therefore it is conceded that there exists a decision and that the said decision falls within the prescribed time for challenging the same, the omission to exhibit the same is curable under Article 159(2)(d) of the Constitution.*

18. I find it necessary to examine in detail the facts in the two decisions cited by **Mr. Munene**. This is because a decision is only an authority for what it decides. The leading authority on this proposition is State of Orissa vs. Sudhansu Sekhar Misra where it was held:-[4]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,**[5]**that "Now before discussing the case of Allen vs. Flood**[6]** and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

19. The ratio of any decision must be understood in the background of the facts of the particular case.[7] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[8] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[9]

20. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[10] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[11]To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[12] My plea is to keep the path of justice clear of obstructions which could impede it.

21. I have patiently studied the facts in the Court of Appeal decision in Republic v Mwangi S. Kimenyi ex parte Kenya Institute for Public Policy and Research Analysis (KIPPRA).[13] First, in the said case, what was before the court was not an objection under Order **53** Rule **7** of the Civil Procedure Rules, 2010. The question before the Court of Appeal was whether the decision quashed by the High Court ever existed in the first place. The decision was referred in the High Court judgment but it was missing in the entire court record, a position confirmed by the following excerpt from the decision of the appellate court:-

> *21. The orders issued by the learned judge was to quash a decision dated 24th August 2004. Was there a decision made on 24th August 2004 which the learned judge could call and remove to court and quash by an order of Certiorari? We have painstakingly perused the record and we have not been able to find or locate any letter or decision dated 24th August 2004. Counsel for KIPPRA submitted that there was no letter dated 24th August 2004 as referred to in the judgment of the High Court. Counsel for*

the respondent admitted that indeed, the letter dated 24th August 2004 does not exist. …

22. The learned judge further called and quashed decisions made on 16th December 2004 which "purported to terminate the applicant's second contract of employment". The respondent sought orders of certiorari to quash the decision in the letter of the Board of KIPPRA alleged to have been made on 3rd December 2004, if any, which otherwise and whose further particulars are unknown, and the decision of the first respondent carried out in the letter dated 16th December, 2004 terminating the Applicant's second contract with KIPPRA.

23. The learned judge in issuing the orders of certiorari stated that the decision of 3rd December 2004 (if any) is patently ultra vires the relevant Act in relation to the respondent. Is there a decision made on 3rd December 2004? The judge stated in the judgment that it is noteworthy to observe that no Board resolution made on 3rd December 2004 had been produced terminating the respondent's employment. The object of the order of certiorari is to call and remove into the High Court a decision that has been made. The evidence on record does not show how the judge arrived at the conclusion to remove and call into the High Court a decision which the court had not satisfied itself that it existed. We have perused the record and we have not seen a decision made on 3rd December 2004. The letter dated 16th December 2004 purports to implement a decision made on 3rd December 2004. If the court is not satisfied that a decision was made on 3rd December 2004, it follows that there was no substratum upon which the court could quash the letter dated 16th December 2004. …"(Emphasis added)

22. The above paragraphs are evidently distinguishable from the facts and circumstances of this case and as stat above, the objection before the court was not failure to annex a decision but a scenario where the court quashed a non-existent decision without satisfying itself of its existence.

23. Second, the case involved an employment contract which the court held was essentially a private law matter which could not attract a public law remedy. On this ground, a judicial Review order could not issue, again another distinguishing feature. Third, the Court of Appeal faulted the judge for quashing a decision which did not exist as opposed to decision that had not been attached to the application.

24. As for the High Court decision of Zachary Onsongo National Police Service Commission & Another[14] also cited upon by **Mr. Munene**, was rendered by a court of coordinate jurisdiction. While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to stare decisis. In the case of R. v. Nor. Elec. Co.,[15] McRuer C.J.H.C. stated:-

> *"....The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).*

25. In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*." I do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge. *First*, there are numerous decisions by our superior courts holding that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law[16] and that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.[17]

26. *Second, Article **259(1)(c)(d)** of the Constitution commands courts while interpreting the Constitution to do so in a manner that permits the development of the law and contributes to good governance.* It should be recalled that sections **8** and **9** of the Law Reform Act[18] are borrowed from common law principles which traditionally governed exercise of Judicial Review jurisdiction. Order **53** of the Civil Procedure Rules, 2010 is borrowed from the said provisions. **Mr. Munene's** argument can hold sway if we are to determine the issue under consideration based on traditional common law Judicial Review principles. Fortunately, the Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. This court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter purely on common law principles.

27. Article **47** of the Constitution provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[19] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The impugned decision is an administrative action, therefore Article **47** applies. The above definition covers any act or decision performed by a body or authority that affects rights or interests.

28. On the face of the above constitutional provision and the right to access justice guaranteed under Articles **48**, the right to enforcement of the Bill of Rights under Article **22,** and the authority of the court to uphold and enforce the Bill of Rights under **23**, the question that arises is whether a citizen citing violation or threat of rights is required to wait until the violation occurs. Differently stated, the Constitution allows a citizen to approach the court in the event of a violation of constitutional rights. In my view, one does not have to wait to be served with a written decision. Even the oral communication or a mere threat is sufficient.

29. *Third*, section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:-

> *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

30. All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[20] and Order **53** of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so

as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[21] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies and State organs. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[22] Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

31. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[23]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

32. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the Court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section **2** of the Fair Administrative Action Act.[24]*Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3)(f).** *Fourth*, section **7** of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review. *Fifth*, the Fair Administrative Action Act,[25] which is a late enactment, having been enacted in 2015, does not require a party to annex a decision nor does it require a written decision. It is instructive to point out that the act permits a party to approach the court for Judicial Review remedies and provides for grounds for Judicial Review.

33. Court decisions should boldly recognize the Constitution as the basis for Judicial Review.[26] Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[27] Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.[28]

34. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes.[29] The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.[30]

35. It is therefore my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision whether it is oral, a letter, an order or proceedings violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.[31] Suffice to say that the *ex parte* applicant has cited violation of Articles **10, 47, 27, 40** and **29** of the Constitution.

36. It is my conclusion that the oral communication complained of falls within the ambit of an administrative decision as defined section **2** of the Fair Administrative Action Act,[32] a legislation that was enacted to give effect to Article **47** of the Constitution. To that extent, the application before me is well grounded on the law and the oral communication falls under "any act," as defined in the Fair Administrative action Act[33], it is a decision capable of being quashed in the event the court finds that it was rendered in a manner that is inconsistent with the law or in violation of Article **47** of the Constitution and the Fair Administrative Action Act.[34] I decline the invitation to dismiss the suit on this ground.

b. Whether this suit offends the doctrine of exhaustion of available remedies.

37. The Respondents in their grounds of opposition stated that the *ex parte* applicant failed to exhaust the statutory provided appellate mechanism, hence, the suit is bad in law for violating the doctrine of exhaustion of available remedies.

38. Building on the above ground, **Mr. Munene**, the Respondents' counsel submitted that the *ex parte* applicant has failed to exhaust the remedies available under section **23** of the act. To fortify his argument, he cited section **9(2)(3)** of the Fair Administrative Action Act[35] and *Geoffrey Muthinja Kabiru & 2 Others**[36]*** where it was held that it is imperative where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked, and, that, courts ought to be a *fora* of a last resort and not the first port of call the moment a storm brews. **Mr. Munene** also cited *Mason Services Limited v Parklands Baptist Church Registered Trustees & Another*[37] where the court held that "a party seeking Judicial Review remedy must exhaust the review and appeal remedies available under the applicable law, and, where the interest of justice, exhaustion of those remedies is not a viable route, the applicant is obligated to move the court for an exemption order. He argued that the *ex parte* applicant has not appealed to the Minister as required under section **23** of the act nor has he applied for an exemption, hence his application must fail.

39. **Mr. Otieno**, the *ex parte* applicant's counsel submitted that section **23** of the act is not couched in mandatory terms, and, that, the *ex parte* applicant's grievances include violation of his constitutional rights under Articles **47** and **50** of the Constitution, which is an exception to the requirement of exhaustion. Citing *R v National Environment Management Authority*[38] he argued that a court can allow the exception requirement where the reliefs sought are the sole purview of the courts. He submitted that it is 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.

40. **Mr. Otieno** further argued that in the instant case, persons associated with NASA political movement had experienced targeted attacks from the government including from the same Minister before whom an appeal would be preferred. He argued that the reliefs sought are in the nature of an inquiry whether the *ex parte* applicant's constitutional rights have been infringed which is beyond the scope of the Minister.

41. Before addressing this issue, I reproduce below section **23** of the act which provides that:-

> *"Any person aggrieved by a refusal of a licensing officer to grant him a firearm certificate under section 5 or to vary 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 f 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."***

42. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[39]It was perhaps most felicitously stated by the Court of Appeal[40] in *Speaker of National Assembly vs Karume****[41]*** 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*."

43. The above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[42]The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[43] where it stated that:-

> *"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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

44. In the *Matter of the Mui Coal Basin Local Community*,***[44]*** the High Court stated thus:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

45. From the above jurisprudence at least two principles can be discerned:- *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[45] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

46. **Mr. Munene** cited Section **9 (2)** of the Fair Administrative action Act,[46] which provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section **(3)** which provides that *"*the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that the applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).** I will revert to this section later.

47. The use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[47]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[48] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

48. A proper construction of section **9 (2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by **9 (4)** which provides that:- *"*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. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances. *Second*, on application by the applicant, the court may exempt the person from the obligation.

49. It is common ground that the impugned decision constitutes an administrative action as defined in section **2** of the Fair Administrative Action Act.[49] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt it from this requirement.[50] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[51]

50. Factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[52] An internal remedy is adequate if it is capable of redressing the complaint.[53]

51. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. *First,* in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.

52. The exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, the *ex parte* applicant has cited infringement of his constitutional rights. The Cabinet Secretary cannot determine questions touching on violation of fundamental rights. These are issues within this court's jurisdiction, hence, on this ground, this case passes the exception requirement.

53. *Second,* the other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This cases passes this test as well.

54. *Third,* the language of the provision ousting the court's jurisdiction must be clear and un ambiguous. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the court has to see at the very outset is, what does the provision say? The courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

55. The operative words in section **23** of the act are *"…may appeal to the Minister, whose decision is final."* When used in a statute, the word *'may'* is permissive as opposed to the words 'must' and 'shall' which are mandatory. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is *directory* if its observance is not necessary to the validity of the proceeding, and a statute may be *mandatory* in some respects and directory in others.[54] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.[55]

56. The above being the clear prescriptions of the meaning of the word *may,* Parliament in its wisdom used the said word in the above provision which is *directory* as opposed to *mandatory*. On this ground alone, I am unable to find that the *ex parte* applicant ought to have exhausted the remedy provided under section **23** of the act. Closely linked to my foregoing finding is my earlier comment on section **9(4)** of the Fair Administrative Action Act[56] which requires an applicant to apply for an exemption. It is also my view that since section **23** is not couched in mandatory terms, it was not necessary for the *ex parte* applicant to apply for an exemption under section **9(4)** of the Fair Administrative Action Act[57] before approaching this court.

57. *Fourth,* this is a case where the Cabinet Secretary publicly made public utterances prior and after the impugned decision was made. The utterances were thinly veiled direct attacks to persons associated with either directly or indirectly with the opposition. The utterances leave any reasonable observer with no doubt that the Cabinet Secretary had either a fixed mind or was hostile to the said class of citizens. Copies of some of the statements attributed to the Cabinet Secretary are annexed to the *ex parte* applicant's further Affidavit in JR No. **46** of 2018 which is closely related to this case. Parties in the two cases made identical submissions and relied on both submissions, hence, the similarity in the two judgments. This is the same Cabinet Secretary who is required to hear the appeal. The facts of each case must be evaluated and a decision made early enough to follow the correct legal path, so as to ensure the sanctity and integrity of the process and the decision. This leads me to the question whether the Cabinet Secretary on the face of his utterances could be expected to be impartial, a question that compels me to examine the rule against bias.

58. As I observed in JR No. **46** of 2018 referred to above, the rule against bias is one of the twin pillars of natural justice. The first pillar --the hearing rule --requires that people whose rights, interests and expectations may be affected by a decision should be given sufficient prior notice and an adequate chance to be heard before any decision is made. The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. Although the bias rule originated in the courts, and was for many centuries applied only to courts and judges, it has now become a rule of almost universal application. The rule against bias applies to a vast range of decision-makers including tribunals,[58] statutory authorities, government ministers, local councils, inquiries, and even private arbitrators.[59]

59. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[60] There are many similar

judicial pronouncements which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[61] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

60. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[62] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be entirely impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[63] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the general public. The High Court of Australia explained that *"Bias, whether actual or apparent, connotes the absence of impartiality."*

61. The utterances attributed to Cabinet Secretary directed at persons in the opposition or directly associated with them manifest absence of impartiality and a ground for reasonable apprehension of bias. It is my conclusion that it would have been a futile exercise for the *ex parte* applicant to opt for an appeal before the same Minister. I also find and hold that reasonable apprehension of bias is a sufficient ground to satisfy the exemption requirement of exhausting the mechanism provided under section **23** of the act.

c. Whether the impugned decision was tainted by procedural impropriety.

62. As stated earlier, parties adopted submissions made in JR No. **46** of 2018 and the authorities cited, hence, I will be marrying them with the arguments in this case where appropriate. **Mr. Otieno**, the *ex parte* applicant's counsel submitted that the impugned decision violates the *ex parte* applicants rights to a fair administrative action and the right to a fair hearing. He argued that the first Respondent is under a duty to act judicially when exercising its administrative actions, and, that, the rules of natural justice must be observed. He argued that the first Respondent had an obligation to ensure that the *ex parte* applicant is not condemned unheard. Citing *Sceneries Limited v National Land Commission*,[64]counsel argued that Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise and submitted that the first Respondent failed to meet the requirements of the constitution. He submitted that procedural fairness is now a constitutional requirement in administrative actions.[65] The *ex parte* applicants complaint is that he was called over the phone and asked to report to the first Respondents offices to surrender his firearms. No reasons or explanation was rendered. He instead moved to this court and obtained a stay.

63. **Mr. Munene**, counsel for the Respondents argument was that the *ex parte* applicant has not met the requirements for granting the Judicial Review Orders sought. He also argued that no decision was made, hence, the orders cannot issue. This argument sounds valid. But, unfortunately, it was raided by way of grounds of opposition as opposed to a Replying Affidavit. One would have expected the officer who is alleged to have made the telephone to call to have sworn an Affidavit stating on oath that he never made the call. Had that happened, the court would probably have been convinced that there was no decision to quash and find so.

64. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. It also applies whether a decision is oral or written.

65. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

66. *Second*, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.

67. *Third*, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work. A telephone call asking a citizen to report to a particular office and hand over a licensed gun without offering a hearing or reasons is arbitrary, dictatorial, harsh and cannot pass constitutional test.

68. *Fourth*, statutes often require that decisions made under them to be supported by reasons.

69. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[66]Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[67]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

70. Section **5(7)** of the act provides that "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 un fit to be entrusted with firearm; or (b) the holder fails to comply with a notice under subsection **(5)** requiring him to deliver up the firearm certificate."

71. The issue that inevitably follows is whether or not the manner in which the first Respondent arrived at the impugned decision amounted

to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. In *Local Government Board v. Arlidge*,***[68]*** Viscount Haldane observed, *"...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made*. *The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice."* *(Emphasis added)*

72. In *Snyder v. Massachussets*,[69] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a *"principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*."

73. In India the principle is prevalent from the ancient times.[70] In this context, para 43 of the judgment of the Supreme Court[71] may be usefully quoted:-

> "*Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law*. *Indeed from the legendary days of Adam-and of Kautllya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."* *(Emphasis added)*

74. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[72] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law****[73]*** says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

75. Thus, it is immaterial that section **5(7)** cited above does not prescribe the right to be heard. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:- *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."* All law must conform to the constitutional edifice. It follows that the provisions of the Firearms Act[74] must be conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.

76. As the Supreme Court of Appeal of South Africa observed[75] *"All statutes must be interpreted through the prism of the Bill of Rights."* Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held***[76]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

77. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[77]

78. Section **4** of the Fair Administrative Act[78] re-echoes Article 47 of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

79. Subsection 4[79] further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. As **Sedley J** put it[80]:- *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

80. *Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for*

administrative actions involves the direct application of the constitution.[81]

81. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness. I have carefully analyzed the facts of this case. I note that no notice was served upon the *ex parte* applicant. Details of the complaint (if any) were not availed to him nor have they been provided in this court. He was not accorded a hearing. The only communication was the telephone call. No details were supplied.

82. Such a drastic decision whether oral or written entitles the affected person to be supplied with the particulars of any allegations against him and an opportunity to challenge the allegations. Procedural fairness contemplated by Article **47** and the Fair Administrative Action Act[82] demands a right to be heard before a decision affecting ones right is made, otherwise the decision will be struck down for being arbitrary, and, for not passing constitutional muster. I find no difficulty in concluding that the first Respondent violated the rules of natural justice. On this ground alone, I am inclined to allow the application.

d. Whether the decision the decision is irrational, unreasonable and un proportionate.

83. **Mr. Otieno,** in his submissions made in JR No. 46 of 2018 which he adopted argued that the decision is irrational, unreasonable and does not meet the test of proportionality and that it violates the *ex parte* applicant's rights to a fair administrative action. He submitted that the first Respondent is under a duty to act judicially when exercising its administrative actions and no independent body could have arrived at the said decision.

84. **Mr. Munene** did not submit on this issue.

85. Unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[83] which provides that:-" *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*." The test for rationality was stated as follows:-***[84]***

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

86. In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.[85] Contextualizing the impugned decision with the circumstances under which it was made leaves the court with the irresistible conclusion that the decision was influenced by other considerations and was made in utter abuse of power and discretion. It cannot be said to be connected or related to the purpose of the statute but appears to have been influenced by extraneous circumstances not rationally connected to the purpose of the statute or the discretion given under the act.

87. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[86] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock[87] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[88]

88. In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.***[89]*** In this regard, the court notes the contents of paragraph **12** of **Mr. Kimaru's** Replying affidavit in which he avers that *"this honourable court ought not to exercise its discretion in favour of the ex parte applicant who has professed openly to be a member of (NASA) National Resistant Movement, a movement which has been proscribed as an organized criminal group at the time of institution of the application herein."* Such an averment read together with the utterances attributed to the Minister and the police harassment and raids subjected to the *ex parte* applicant raise a reasonable possibility of ill motive and improper use of statutory and discretionary power for purposes other than what Parliament intended.

89. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it****[90]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[91]This stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[92] the Federal Court of Australia considered the ground. The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them".

90. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;

91. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

92. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[93]

93. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

94. Judicial intervention in Judicial Review matters is limited to cases such as this one where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference, or where he had failed to apply his mind to the matter. This is a proper case for judicial interference.

e. Whether the first Respondent erred by failing to give reasons for the decision.

95. **Mr. Otieno** argued that the first Respondent was under a duty to give reasons under Article **47(2)** of the Constitution. He also argued that no reasons were communicated in the telephone call. **Mr. Munene,** counsel for the Respondent did not address this issue other than the broad statement that the *ex parte* applicant has not met the requisite requirements for granting Judicial Review orders.

96. Section **4(2)** of the Fair Administrative Action Act[94] provides that "every person has the right to be given written reasons for any administrative action that is taken against him." The impugned decision only cites section **3(5)(b)** and **5(7)** of the act and states that the *ex parte* applicant is unfit to be entrusted with a firearm anymore. No reasons have been provided. It is not enough to recite the statutory provisions. The reasons for the decision must be provided. This is a constitutional and statutory imperative. The Fair Administrative Action Act[95] provides at section **4(2)** cited above for the right to be provided with reasons. The Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights.

97. Section **5(7)** of the act gives discretion to the licensing officer, but where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[96]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. A purposive interpretation of the above section leaves me with no doubt that the duty to give reasons is implied. This is because it is a constitutional requirement.

98. In *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other**[97]*** the Court of Appeal stated that:-

*"Under **Article 47 (2) of the Constitution** as read with the provisions of the **Fair Administrative Actions Act of 2015**, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions... In **Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014,** Githinji JA in considering the duty to give reasons for administrative action in light of **Article 47 (2) of the Constitution** expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause."*

99. It is beyond argument that the first Respondent was under a duty to provide reasons as opposed to reciting the provisions of the statute. On this ground alone, I find and hold that the decision offends Article **47** of the Constitution and section **4(2)** of the Fair Administrative Action Act.[98]

f. Whether the decision is illegal and/or violates the ex parte applicant's right to legitimate expectation.

100. **Mr. Otieno** submitted that the decision failed to meet the test of legality for failing to satisfy statutory requirements and for violating the *ex parte* applicants fundamental rights.[99] He argued that, courts in a Judicial Review application can in a limited scope delve in to the merits of a decision.[100] **Mr. Munene** concluded his submissions by arguing that the first Respondent was well within its legal mandate of

exercising its discretion, hence, the decision cannot be said to be illegal or unreasonable.

101. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law"* ***[101]***

102. When the legality of a decision or an act or omission of a statutory or public body is challenged, the court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[102] the impugned decision, or act or omission is capable of being read in a manner that is constitutionally compliant. Differently put, whether an act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[103] and the relevant statutory provisions. The court is obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

103. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The task for the Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The Courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ‘‘four corners’’ of their powers or duties. They are also acting as guardians of Parliament’s will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament’s enactments.

104. Two critical issues flow from the foregoing section. *First,* whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the first Respondent. A decision is *illegal* if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

105. Statutes do not exist in a vacuum.[104] They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude.[105] The courts should therefore strive to interpret powers in accordance with these principles.

106. It has by now become axiomatic that the doctrine or principle of legality is an aspect of the Rule of Law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only.[106] The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful.[107]A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.[108] Decision-makers should not pursue ends which are outside the ‘‘objects and purposes of the statute.’’ It is said that power should not be ‘‘exceeded’’ or that the purposes pursued by the decision-maker should not be ‘‘improper,’’ ‘‘ulterior’’, or ‘‘extraneous’’ to those required by the statute in question. It is also said that ‘‘irrelevant considerations’’ should not be taken into account in reaching at a decision.

107. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.[109] What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

108. The Rule of Law is a founding value of our constitutional democracy.[110]It is the duty of courts to insist that the State, in all its dealings, operates within the confines of the law. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the Rule of Law. When upholding the Rule of Law, we are thus required not only to have regard to the strict term of regulatory provisions but so too to the values underlying the Bill of Rights. Of importance is the demand that decisions must be made and executed lawfully, fairly and expeditiously.

109. The power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. Decisions by public bodies must conform to the Constitution and be interpreted and applied within its normative framework.[111]Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated in Article **10** of the Constitution and the Bill of Rights. The action or decision complained of must conform to the statutory provisions and must pass the Constitutional muster. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* ***[112]*** the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> *a.* ***Illegality****- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be* ***"illegal".*** *Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b.* ***Fairness****- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is*

reached.

*c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute **'irrationality"** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation **[113]**:-*

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

110. The provisions conferring mandate upon the Respondents must be read in the context of not one but three different imperatives. The *first* is to enable the Respondents to effectively carry out their specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for them to perform their functions through the application of the law. *Second*, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Respondents' decisions affects the *ex parte* Applicant, the Respondents are obliged **not** to act unfairly. The impugned decision must accordingly be construed so as to promote respect for the Bill of Rights. A *third* dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body.[114]Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the Respondents would act in such a manner as to violate or trump or trivialize a citizens' Constitutional rights.

111. It common ground that the decision was arrived at without affording the *ex parte* applicant an opportunity to be heard nor was it given a notice or reasons for the decision. No argument was advanced before me by the Respondents that the impugned decision is justifiable and can pass the Article **24** analysis test. It has not been shown that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom, the importance or the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

112. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*** **[115]** where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

"…The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

113. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.

114. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[116] These include: (i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification", (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

115. Like all other written Constitutions in the world, our Constitution declares its supremacy over all other laws and that it binds all persons and State organs at all levels of government.[117] It also provides that no person may claim or exercise State authority except as authorized under the Constitution.[118] Consistent with the supremacy clause, the Constitution provides that any act or omission in contravention of the Constitution is invalid.[119] It is my conclusion that the *ex parte* applicant had a legitimate expectation that the first Respondent would act fairly and in conformity with Article 47 and the Fair Administrative Action Act.[120]

116. Also relevant to the issue under consideration is Article **73** of the Constitution which provides that:-

***73.** (1) Authority assigned to a State officer—*

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) ---

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

g. Whether the decision was tainted by bad faith.

117. **Mr. Otieno** submitted that a decision can be nullified where a body acts in bad faith, and, that, in the instant case the telephone call was preceded by the utterances referred to earlier. The crux of **Mr. Munene's** argument as stated earlier was that the *ex parte* applicant has not met the requisite requirements for granting the orders sought.

118. A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament. Bad faith can be inferred where like in this case there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The undisputed utterances leave the court in doubt on the legality and motive of the decision but suggest bad faith or a reasonable possibility of ill motive or bad faith in making the impugned decision.

Final orders.

119. In view of my analysis of the issues distilled herein above, and the conclusions made on each issue, the conclusion becomes irresistible that the *ex parte* applicant has demonstrated sufficient grounds to warrant this court to grant the Judicial Review relief sought. Accordingly, I find and hold that the *ex parte* Applicant's Application dated ***12th*** *February 2018* succeeds. Consequently, I grant the following order:-

a) An order of ***Certiorari*** *be and is hereby issued quashing the first Respondent's oral summons to the ex parte applicant directing him and or requiring him to surrender his licensed firearms to its offices as communicated through its Chief Licensing Officer.*

b) No orders as to costs.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **17th** day of **January** 2019.

John M. Mativo

Judge.

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[1] {2013}eKLR.

[2] {2015}eKLR.

[3] {2017} eKLR.

[4] MANU/SC/0047/1967

[5] {1901} AC 495

[6] {1898} AC 1

[7] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[8] Ibid

[9] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[10] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[11] Ibid.

[12] Ibid.

[13] {2013}eKLR.

[14] {2015}eKLR.

[15] Ibid

[16] *See R***epublic** *vs. The Commissioner of Lands Ex parte Lake Flowers Limited* Nairobi HCMISC. Application No. 1235 of 1998.

[17]*See Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another* Nairobi HCMA. No. 689 of 2001 {2006} 1 EA 318.

[18] Ibid.

[19] Act No. 4 of 2015.

[20] Cap 26, Laws of Kenya.

[21]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[22] Article 47(1) of the Constitution of Kenya, 2010

[23] *2000 (2) SA 674 (CC) at 33.*

[24] Act No. 4 of 2015.

[25] Act No. 4 of 2015.

[26] *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*{2018}eKLR.

[27] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[28] *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*{2018}eKLR.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Act No. 4 of 2015.

[33] Ibid.

[34] Ibid.

[35] Act No. 4 of 2015.

[36] {2015}eKLR.

[37] {2018} eKLR.

[38] {2011}eKLR.

[39] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[40] Ibid.

[41] {1992} KLR 21.

[42] Ibid.

[43] {2015} eKLR.

[44] {2015} eKLR

[45] Ibid.

[46] Act No. 4 of 2015. (An act of Parliament that was enacted to bring into operation Article **47** of the Constitution)

[47]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[48] Ibid.

[49]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[50] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[51] Koyabe supra para 39.

[52] Ibid para 44.

[53] Ibid paras 42, 43 and 45.

[54] *Subrata vs Union of India* AIR 1986 Cal 198.

[55] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.

[56] Act No. 4 of 2015.

[57] Act No. 4 of 2015.

[58] Groves, M. "The Rule Against Bias" {2009} UMonashLRS 10, citing Cheung v Insider Dealing Tribunal [2000] 1 HKLRD 807; Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 (HL); *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER (HL); *Grant v Teacher's Appeals Tribunal (Jamaica)* [2006] UKPC 59. The rule also clearly extends to public sector disciplinary tribunals and their proceedings. *See*, eg, Rowse v Secretary for Civil Service [2008] HKCFI 549; [2008] 5 HKLRD 217 and Lam Siu Po v Commissioner of Police [2007] HKCA 461; [2008] 2 HKLRD 27.

[59] Ibid

[60] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[61]Minister for Immigration and Multicultural Affairs Ex p Jia (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); Bell v CETA (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[62] R v Sussex Justices Ex p McCarthy [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": Shrager v Basil Dighton Ltd [1924] 1 KB 274 at 284.

[63] *See*, eg, Ebner v Official Trustee [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); Forge v Australian Securities Commission [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also Belilos v Switzerland [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

[64] {2017}eKLR.

[65] Citing *Judicial Service Commission v Mbalu Mutava & Another* {2015} eKLR.

[66] Article 47(1) of the Constitution.

[67] Article 47(2) of the Constitution.

[68] {1915} AC 120 (138) HL

[69] {1934} 291 US 97(105)

[70] We find it Invoked in Kautllya's Arthashastra.

[71] In the case of *Mohinder Singh Gill v. Chief Election Commissioner*,AIR 1978 SC 851

[72] (1980), at page 161.

[73] (1977) at page 395.

[74] Cap 114, Laws of Kenya.

[75]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[76] In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33.*

[77] *Kioa v West* (1985), Mason J.

[78] Act No. 4 of 2015.

[79] Ibid.

[80]in *R vs Somerset CC Ex parte Dixon(COD)*{1997} Q.B.D. 323.

[81] In the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.*

[82] Act No. 4 of 2015.

[83] Act No. 4 of 2015.

[84] By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674 (CC)* at page 708; paragraph 86.

[85] In *Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P

[86] Act No. 4 of 2015.

[87] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[88]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[89] See *Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)* at 316, para 36, per Froneman JA.

[90] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[91] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[92] {1985} 6 FCR 155.

[93] Justin Gleeson, “Taking stock after Li”, in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[94] Act No. 4 of 2015.

[95] Act No. 4 of 2015. (Which was enacted to bring into effect Article **47** of the Constitution).

[96] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[97] {2016} eKLR.

[98]Act No. 4 of 2015.

[99] Citing *Mumo Matemu v Trusted Society of Human Rights Alliance and Others*, Nairobi Civil Appeal No. 290 of 2012.

[100] Citing *Kenya Human Rights Commission v Non-governmental Organization Co-ordination Board* {2016} eKLR.

[101] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [2006] ZACC 9; 2007 (1) SA 343 (CC).

[102] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[103] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[104] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[105] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[106] As Ngcobo CJ said in *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49

[107] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[108] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[109] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[110] Articles 10 (2) (a) and 19 of the Constitution.

[111] See Article 259 of the Constitution.

[112] JR No 17 B of 2015.

[113] {1948} 1 K. B. 223, H.L.

[114] Article 50 (1).

[115](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136.

[116] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[117] Article 2 (1) of the Constitution.

[118] Article 2 (2) of the Constitution.

[119] Article 2 (4) of the Constitution.

[120] Act No. 4 of 2015.