REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 65 OF 2019

In the matter of The Law Reform Act (Cap 26, Laws of Kenya)

and

In the matter of Article 25 (c), 27(1), 40, 47, 48 and 50 of the Constitution of Kenya, 2010

and

In the matter of The Fire Arms Act (Cap 114, Laws of Kenya)

and

In the matter of Section 11 of the Fair Administrative Action Act (No. 4 of 2015), Laws of Kenya

and

In the matter of an application

Between

Republic.....Applicant

versus

Firearms Licensing Board.....1st Respondent

The Cabinet Secretary, Ministry of Interior & Coordination

of National Government.....2nd Respondernt

and

Stephen Vincent Jobling.....*Ex parte* applicant

RULING

The Parties

1. The applicant, Stephen Vincent Jobling is a male adult of British descent currently residing and working in Kenya.

2. The first Respondent is the Firearms Licensing Board, established under section 3 of the Firearms Licensing Act, [1] (hereinafter referred to as the act). Its functions as provided under section 3(5) of the act are to— (a) Certify suitability of applicants and periodically assess proficiency of firearms holders. (b) Issue, cancel, terminate or vary any licence or permit issued under the Act. (c) Register civilian firearm holders, dealers and manufacturers of firearms under the Act. (d) Register, supervise, and control all shooting ranges registered under the Act. (e) Establish, maintain and monitor a centralized record management system under the Act. (f) Perform such other functions as the Cabinet Secretary may prescribe from time to time.

3. The second Respondent is the Cabinet Secretary responsible for internal security appointed pursuant to Article 152(2) of the Constitution.

The prayers sought.

4. By an application dated **13th** November 2019, the applicant seeks the following orders:-

a. Spent.

b. Leave be granted to the applicant to apply for an order of certiorari, to call to this honourable court, and quash the decision of the 1st Respondent communicated in the 1st Respondent's receipt form dated 7th March 2019 purporting to revoke his Civilian Firearm Certificate No. 003966 formerly 9032 issued on 17th December 2019, entitling him to bear the following firearms:-

i. Rifle 223 (S/No.3071729)

ii. Shot Gun (S/N 12Y01110)

iii. Glock (S/N UAN 742)

iv. Glock (S/No Sss261)

c. Leave be granted to the applicant to apply for an order of mandamus to compel the 1st Respondent to issue the applicant with Civilian Firearms License and the Firearms Rifle 223 (S/No 3071729; Shot Gun (SN 12Y01110); Glock (S/N UAN 742); Glock (S/No Ssss261).

d. Leave be granted to the applicant to apply for an order of prohibition to prohibit the Respondents, their servants, agents, employees and or any other person(s) acting pursuant or purporting to act on their instructions from withdrawing the Firearm License duly issued to the applicant without any basis in law.

e. That the grant of leave to institute proceedings as aforesaid to operate as a stay of the purported revocation of the applicant's Civilian Firearm Certificate Number 003966 in terms communicated in the 1st Respondent's receipt form dated 7th March 2019 and any interference of the liberty and movement of the applicant pursuant to the purported public announcement. That the Respondents be ordered to reinstate all the certificate and return the applicants firearm book, identity card, all firearms, magazines stated herein forthwith.

f. A declaration that the Press Release issued on 31stJanuary 2019 is unconstitutional, illegal, invalid and has no legal effect.

g. Costs of this application be awarded to the applicant.

Factual matrix

5. The applicant states that he is duly licensed and authorized under section 5 of the Firearms Act[2] to possess and carry firearms in accordance with the terms of Firearms Certificate Number 003966 issued to him on 7thJanuary 2018.

6. He states that on 31stJanuary 2019, the first Respondent's Chairman, through a press release notified all Civilian Firearm Licensed Holders they were required to undergo vetting, after which they would be issued with a new license and a smart card after ten (10) working days. The applicant also states that the press release notified Civilian Licensed Holders that the vetting exercise was mandatory for all persons in possession of firearm licenses and permits. He also stated that the Firearms License Holders were expected to provide all supporting documents for all licenses acquired as well as all firearms and ammunitions.

7. The applicant further states that on 7th March 2019 he complied with all the requirements set out in the press release and appeared before the 1stRespondent for vetting. However, states that during the preliminary interviews, two board members ordered him to surrender his firearms.

8. He further states that upon asking for reasons for the decision, a Board Member became unreasonable, abusive and irrational. The applicant contends that the said conduct amounted to unlawful disarmament of firearms legally held and was in breach of the verification and vetting as indicated in the press release. In addition, the applicant states that another person threatened to arrest him and insisted that he surrenders his license and firearms.

9. He also states that vide a receipt issued in Form 11 of the Act, the 1st Respondent pursuant to the announcement by the second Respondent withdrew or purported to withdraw his Firearms Certificate Number 0039966 issued in 2012. The applicant further states that there was no explanation from the Respondents for revoking his license, and, that, none of his firearms falls under the prohibited category in section 2 of the act.

Legal foundation of the application

10. The applicant cited Article 47 of the Constitution and argued that he is entitled to an administrative action that is expeditious, efficient,

lawful, reasonable and procedurally fair, and, that, he was not given any notice nor was he provided with any reasons for the decision. He also states that the Press Release is invalid on grounds that it is not a statutory instrument.

11. The applicant further states that the Respondent's conduct is irrational, unreasonable, made in bad faith and that it is not based on any material facts or circumstances or legal foundation. He also states that the Respondent failed to comply with its legal obligations, and took into account irrelevant considerations.

12. The applicant further assaults the decision on grounds of *ultra vires* stating that the first Respondent exceeded its authority under section 5 of the act, and failed to conduct itself as required by the Constitution. He also cites violation of his right to Natural justice stating that he was not given an opportunity to be heard before the decision was made.

13. He further contends that the Respondents acted maliciously, that the decision was prompted by ulterior motive and bad faith and that their conduct was not guided by public interest as expected under Article 232 of the Constitution. Lastly, the applicant cites violation of his right to legitimate expectation on grounds that having been licensed as aforesaid, he purchased firearms and ammunition as his private property.

Respondent's grounds of opposition

14. The Respondents' counsel filed grounds of opposition on 1st April 2019 stating that this application is premature, that, it lacks merit and the same is based on a misconception of the law. The applicant also stated that the application offends the provisions of section 9 (2) of the Fair Administrative Action Act[3] (herein after referred to as the FAA Act). In addition, the Respondents stated that the application offends section 23 of the Firearms Act (the act) and, that; it is an abuse of court process.

The arguments

15. The applicant's counsel relied on the pleadings filed and argued that a consent order was recorded in JR No. 481 of 2018 which raised similar issues as in this case. He submitted that the terms of the said consent were to allow for regulation by the respondents and digitalization of records for civilian gun holders. He submitted that the applicant complied with the press release and appeared before the first Respondent on 7th March 2019 with a view to having his records digitalized, only to be threatened with arrest and to be ordered to surrender his firearms without being given reasons.

16. Counsel submitted that the applicant seeks leave to challenge the sequence of events, the decision, and breach of all procedural safeguards by the respondents. On the question of exhaustion of the remedy provided under the act, he argued that where a decision or the alternative procedure is expected to be a mere facade, judicial review would be allowed. He argued that the application is merited, and, urged the court to grant the leave sought. He also argued that if the leave does no operate, the entire suit would be rendered nugatory.

17. He submitted that under section 32 of the Act, an appeal lies to the same Minister who directed the issuance of the press release now under challenge. Counsel invoked this courts immense jurisdiction under Article 165 of the Constitution. He submitted that the impugned decision affects the applicant's livelihood. He further contended that the matter is of great public interest and argued that the court is being asked to pronounce itself on the legality of directives that have the force of the law, a preserve of Parliament. It was his submission that the consent referred to above was to allow the Minister to promulgate Regulations. He also submitted that the applicant is challenging the mandate of the first Respondent to make the impugned decision.

18. The Respondents counsel cited section 23 (2) (3) of the act as read with section 9 (2) (3) of the FAA act and argued that where there is a statutory dispute resolution mechanism, the parties are expected to exhaust the mechanism before approaching the court. He cited *Speaker of National Assembly vs Karume*[4] and argued that the applicant has not exhausted the mechanism provided; hence, the application is premature.

19. In reply to the above submissions, the applicants' counsel argued that there are exceptional circumstances in this case in that the board is under the control of the same Minister, and argued that there is a confusion whether the decision of the Board can be considered to be a decision of the Chief licensing Officer.

Issues for determination

20. Upon analyzing the pleadings, I find that the following issues fall for determination, namely:-

a. *Whether the ex parte applicant has established grounds for the court to grant the leave sought.*

b. *Whether this suit is bad in law under the doctrine of exhaustion.*

a. Whether the ex parte applicant has established grounds for the court to grant the leave sought.

21. This case presents an opportunity to this court in a subtle fashion to consider the question whether under the 2010 Constitution; leave to commence Judicial Review proceedings is still a prerequisite. Differently put, is the requirement for leave to commence Judicial Review proceedings consistent with the dictates of the 2010 Constitution.

22. I will first address the question on the importance of leave in judicial review proceedings. The importance of obtaining leave in a Judicial Review application was eloquently stated in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57*

others[5] thus:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)*

23. Similarly in *Meixner & Another vs A.G,*[6] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

24. At the leave stage an applicant must show that:- (i) 'sufficient interest'[7] in the matter otherwise known as *locus standi*; (ii) that he/she is affected in some way by the decision being challenged; (iii) that he/she has an arguable case and that the case has a reasonable chance of success; (iv) the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; (iv) the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

25. At the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair* and *irrational*. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

26. The above cases were determined before the promulgation of the 2010 Constitution. Order **53** of the Civil Procedure Rules, 2010, is borrowed from Sections **8** and **9** of the Law Reform Act.[8]The said provisions are premised on the common law Jurisprudence governing Judicial Review proceedings.

27. A pertinent question arises. That, is, whether under the 2010 Constitution, a person requires leave to approach the court. The entrenchment of the right to access the court in the Constitution opened the doors to access justice, a position best explained by the phrase *"Justice is open to all, like the Ritz Hotel"*[9]attributed to a 19th Century jurist. Article **22** of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article **23** grants the court the authority to uphold and enforce the Bill of Rights.

28. Article **48** guarantees the right to access court. Article **258** provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Also relevant is the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

29. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the FAA Act. 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.

30. Article **23 (3)** provides the remedies the court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

31. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision of a tribunal requires the leave of the court to apply for Judicial Review Orders. 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."*

32. The position that all law must conform to the Constitutional edifice remains unchallenged. It follows that the provisions of sections **8** and **9** of the Law Reform Act[10] 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[11] *"All statutes must be interpreted through the prism of the Bill of Rights."*

33. It is undeniable that 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; hence, jurisprudence from South Africa on the subject may be useful. In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others,*[12] it was held that, the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution. The court proceeded to hold that insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. It added that 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.

34. It is useful to point out that the entrenchment of the power of Judicial Review, as a constitutional principle expanded 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 leave unnecessary. *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 FAA Act provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

35. This court has severally opined that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[13] 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. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. 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.

36. In my humble view, time has come for Parliament to consider the relevancy and constitutionality of the sections 8 and 9 of the Law Reform Act[14] and Order 53 of the Civil Procedure Act, 2010 which prescribe a litigant must seek courts leave before approaching the court. This is because our 2010 Constitution guarantees access to justice. The right to approach the court received a seal of constitutional approval, courtesy of Article **48** of the Constitution. This in my view rendered provisions of the law that require a litigant to seek courts leave to commence Judicial Review proceedings obsolete.

b. Whether this suit is bad in law under the doctrine of exhaustion.

37. Section 23 of the act provides as follows:-

> *(1) Any person aggrieved by a refusal of a licensing officer to grant him a firearm certificate under section 5 or to vary or renew a firearm certificate, or by the revocation of a firearm certificate, or by a refusal of a licensing officer to grant him a permit under subsection (12) of section 7, or by the revocation of such a permit, or by a refusal of a licensing officer to grant him a permit under subsection (13) of section 7 or to renew such a permit, or by the revocation of such a permit, or by the refusal of a licensing officer to register him as a firearms dealer, or by the removal of his name from the register of firearms dealers by a licensing officer, or by the refusal of a licensing officer to enter a place of business in the register of firearms dealers under section 15 or by the removal of any such place of business from the register,* ***may appeal to the Minister, whose decision shall be final.***
>
> *(2) An appeal under this section* ***shall be lodged within fourteen days*** *after the date on which the appellant first received notice, whether written or oral, of the decision by which he is aggrieved.*
>
> *(3) On an appeal under this section, the Minister may either dismiss the appeal or give such directions as he may think fit to the licensing officer from whose decision the appeal has been lodged, as respects the firearm certificate, permit or register which is the subject of the appeal.*

38. I find no contest before me that the impugned decision was taken pursuant to the governing statute. I also find no challenge on whether the impugned decision falls within the ambit of decisions referred to in section 23(1) of the act. The contest as I understand it from the applicant's claim is on the legality or otherwise of the decision and the procedural propriety or impropriety of the decision. Differently put, the applicant is challenging a decision made by the first Respondent pursuant to the act.

39. The crux of the objection filed by the Respondents counsel is that the applicant ought to have exhausted the mechanism provided under the act. This in my view is an invitation to this court to address the question whether this court is divested of jurisdiction to hear this matter on grounds that the applicant failed to exhaust the mechanism provided under the above section.

40. 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.[15]It was perhaps most felicitously stated by the Court of Appeal[16] in *Speaker of National Assembly vs Karume*[17] cited by the Respondents counsel 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*."

41. The above case was decided before the promulgation of the Constitution of Kenya. However, many cases in the Post-2010 era have not only found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution,[18] but have adopted the said reasoning. For example, 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*,[19] 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."

42. The High Court in the *Matter of the Mui Coal Basin Local Community*,[20] stated:-

"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..."

43. Two principles can be discerned from the above jurisprudence. *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.[21] 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.

44. Section **9 (2)** of the FAA Act, 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 an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

45. The above provisions warrants scrutiny and interpretation. 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.[22]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[23] 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.

46. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

47. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[24] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[25] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

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.

49. As stated earlier, the applicant's counsel in his replying submissions submitted that there are exceptional circumstances in this case in that the board is under the control of the same Minister, and argued that there is a confusion whether the decision of the Board can be considered to be a decision of the Chief licensing Officer.

50. In my view, the above argument fails on two grounds. One, the issues raised do not qualify to be exceptional circumstances. I am aware that what constitutes exceptional circumstances depends on the facts of each case.[26] Article **47** of the Constitution and the FAA Act are heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of **Thring J** are relevant:-[27]"

i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their

existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

51. Perhaps, I should hasten to state that there is no definition of 'exceptional circumstances' in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[28]

52. In yet another South Africa decision[29] the court said the following about what constitutes exceptional circumstances:-

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

53. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

54. The second ground upon which the applicants reasoning and reasons cited must collapse is that, only on an application by the applicant, the court may exempt the person from the obligation to exhaust the remedy. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act. The applicant never applied for an exception in this case despite the clear provisions section 9(4), which is couched in mandatory terms. Thus, even if the reasons cited qualified to be exceptional circumstances, his suit would collapse for failing to apply for exemption.

55. In any event, the person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[30] Section **9(4)** of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

56. It is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the *ex parte* applicant can show exceptional circumstances to exempt it from this requirement.[31] Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[32] Factors 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.[33] An internal remedy is adequate if it is capable of redressing the complaint.[34]

57. 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, no convincing argument was advanced nor can I discern any virgin argument touching on constitutional interpretation.

58. 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, and that 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. In the case before me, no argument was advanced that the mechanism under the act was not adequate nor do I find any reason to find or hold so.

59. The *second* 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 argument was not advanced before me nor do I discern it from the facts of this case.

60. A casual look at the *ex parte* applicant's case shows that it is aggrieved by a decision made pursuant to the Firearms Act. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. I find no argument before me that the forum created by the act is not competent to address the dispute.

61. In view of my analysis and the determination of the issue under consideration herein above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. Alternatively, if at all there existed any exceptional circumstances, then, he ought to have complied with the requirements of the law and apply for exception and demonstrate the existence of exceptional circumstances. I find that this case offends section **9 (2) (3) (4)** of the FAA Act. Consequently, I find and hold that this suit offends the doctrine of exhaustion of statutory provided remedies. It must fail. Accordingly, I dismiss the application dated 13th March 2018 with no orders as to costs.

Orders accordingly

Dated, Signed, Delivered at Nairobi this 8th day of July, 2019

John M. Mativo

Judge

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[1] Cap 114, Laws of Kenya.

[2] Cap 114, Laws of Kenya.

[3] Act No. 4 of 2015.

[4] {1992} KLR 21.

[5] Mombasa HCMISC APP No 384 of 1996.

[6]{2005} 1 KLR 189

[7] See *R vs Panl for Takeovers and Mergers ex p Datafin* {1987}I Q B 815.

[8] Cap 26, Laws of Kenya.

[9] Sir James Matthew, 19th Century jurist.

[10] Cap 26, Laws of Kenya.

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

[12] *2000 (2) SA 674 (CC) at 33.*

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

[14] Cap 26, Laws of Kenya.

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

[16] Ibid.

[17] {1992} KLR 21.

[18] Ibid.

[19] {2015} eKLR.

[20] {2015} eKLR

[21] Ibid.

[22]*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).

[23] Ibid.

[24] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[25] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[26] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[27] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[28] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[29] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[30] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[31] *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).

[32] Koyabe supra para 39.

[33] Ibid para 44.

[34] Ibid paras 42, 43 and 45.