REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. CIVIL APPLICATION NO. 193 OF 2012

PATRICK KARIUNGI ..……..……..APPLICANT

VERSUS

THE COMMISSIONER OF POLICE……1ST RESPONDENT

THE ATTORNEY GENERAL....……....…….2ND RESPONDENT

JUDGEMENT

Introduction

1. In its Notice of Motion dated 31st May, 2012 filed in this Court the same day, the ex parte applicant herein, **Patrick Kariungi,** seeks the following orders:

1. **THAT this Honourable Court be pleased to grant orders in the nature of prohibition to operate as a stay of the criminal proceeding in question until determination of the application or until the judge orders otherwise.**
2. **THAT this Honourable Court be pleased to grant orders in the nature of certiorari to quash the decision of the Chief Licensing Officer in revocation of the Applicant's firearm certificate.**
3. **THAT the Applicant's firearm be returned to him.**
4. **THAT no relevant enquiries were made nor representations obtained from the Applicant as he was not given an opportunity to comment on all other matters of relevance.**

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by the Applicant on 9th May, 2012.
3. According to the Applicant, he resides near Nazarrene University, Ongata Rongai in Kajiado County where he has lived for many years on a large area of land that is well kept by way of vegetation and is security fenced and guarded. However, he has had numerous incidents that jeopardize his security and his family which have been reported to the police including OB 34/12/6/07/ 26/19/10/06, OB 39/16/19/08 26/19/10/06, OB 5/27/2/09 6/12/2010, OB 17/24/10/2009.
4. Because of the security situation in the area the Government through the firearms Chief licensing Officer issued him with a civilian firearm certificate number 124 on 11/10/1984 to hold a pistol (CFFFID No. 124. According to him, all through he has had the firearm and held it strictly in accordance with the regulations and the law, including the ***Firearms Act***, Cap 144, Laws of Kenya. However, on or about 4th March 2012 about 3 p.m. he was attacked at his home by marauding group who came with sundry animals including goats and sheep in large numbers

armed with spears, *rungus*, and swords and after breaching and jumping his fences, charged at him screaming that he had injured their animals. The applicant ran off to the house and since his wife was out there at the scene where he was challenged, he fetched his pistol and dashed back. As they were besieged, he was constrained to fire in the air three rounds of ammunition before the mob retreated.

5. The applicant deposed that in accordance with the law of firearms usage he phoned the area AP Post to inform them and likewise phoned the OCS Ongata Rongai, Police Station. However, at the station he queued up to 6 pm before being attended at the report office and when the OCS came to the station, he approached him and informed him that he was the one who had called him on the discharge of ammunition issue. At that point the OCS said he was aware of the issue and pushed him into the cells declaring he had killed animals and endangered people's lives. He added that the OCS declined to have his report entered in the occurrence book and did not agree to listen to his side of the story and instead ordered him to hand over the pistol which he did. He was then locked up and refused cash bail which he was able to pay and it was only on or about April 2012 that he received a registered letter from the Post Office from the Chief Licensing Officer of Firearm reference number CFB/NBI/KARUINGI/P/69 dated 5th March 2012 but post marked 18th March 2012 which letter apparently was written much later than 5th March 2012 and backdated to suit the whims of the "powers to be" as it is unconceivable that the incident herein occurred on 4th March 2012 about 3.00pm and he went to the police station in the evening to report the same and overnight the facts were rendered and meeting held so that the morning of 5th March 2012 a letter conveying the "decision" is written. The applicant's view was reinforced by the fact that it was posted on 18th March 2012 as the postmark showed.
6. The applicant deposed that the processes of fingerprinting was undertaken at night and the next day 5th March 2012 he was arraigned before the Chief Magistrate at Kibera Law Courts charged with injuring animals contrary to **Section 338** of the Kenya ***Penal Code***, Cap 63, Laws of Kenya in Criminal Case Number 1186 of 2012. From the charge sheet the applicant learned that the assailants had complained at the police station that he killed and/or injured their animals vide OB 78/04/03/2012 and PC 735/80/2012.
7. It was averred by the applicant that he was neither handed over a document to acknowledge receipt of the firearm by the OCS nor given an opportunity to narrate the events of the day for a fair understanding of the incidents. Further he never had any communication from OCS or the Chief Firearm Licensing Officer.
8. However, on 6th March 2012 he read in the ***Daily Nation*** newspaper an item ***"Licensed gun holders held over mis-use of firearms"*** and the first three paragraphs appear to refer to my case from which he deduced that the Provincial Officer Nairobi had cancelled the permit for his firearm. In his view, the Provincial Police Officer had no power to cancel a firearm permit, let alone to issue and in any case he was not addressed nor asked about the circumstances of the incident. He therefore asserted that his constitutional rights were violated and his security placed at great risk.
9. The applicant deposed that consequent to this occurrence his advocate commissioned a private investigator, COVEY-LINK to carry out investigations and render a report as police had prevented him from recording his complaints which they should have investigated. He averred that unless this honourable court issues orders for the return of his firearm and the law be followed in dealing with this matter his security was at great risk and his constitutional rights were being violated blatantly.
10. In a further affidavit sworn by the applicant on 27th June, 2012, the applicant disclosed that the aforesaid criminal case was dismissed and he was acquitted on 18th June, 2012 hence there was no basis for the purported action by the Chief Firearm Licensing Officer. According to him the complaints which formed the subject of the charge levied against him and which were the basis of the action by the Chief Firearm Licensing Officer were fake.
11. He asserted that the withdrawal of his firearm certificate was accentuated by malice and was whimsical and ought to be reinstated.

Respondent's Case

12. In response to the application the Respondent filed the following grounds of opposition:

1. The orders sought cannot be issued in Judicial Review application as the court has no jurisdiction to issue grant the reliefs sought.

2. This court has not been involved to issue the orders sought as the same is not supported by any law.

3. Judicial Review is concerned with substantive justice and granting the application would amount to miscarriage of justice as it will be contrary to provisions of the constitution, *inter alia* Article 159.

4. There has been inordinate delay in bringing the instant application and justice should be for all and should cut both sides.

5. The Applicant also filed a further dated 16th April 2013 without the leave of the curt and is seeking equity with unclean hands.

6. The application is an afterthought and strategy to delay the hearing of the matter and a waste of judicial time as the matter has been ready for hearing for over seven months and the Applicant has not been ready to proceed on all the instances.

7. The Applicant has not demonstrated the prejudice he has suffered or is likely to suffer if the Respondent's replying affidavit is admitted in this matter.

8. That the Respondents stand to suffer great prejudice if the instant application is allowed as the same may cause great miscarriage of justice.

9. That is only in the interest of justice that the court dismisses the instant application with costs and allow the parties urge the substantive motion.

13. The Respondents further filed a replying affidavit sworn by **David Baya Yaah**, the Chief Licensing Officer, Central Firearms Bureau on 7th March, 2013.
14. According to him, his office pursuant to the provisions of the ***Firearms Act*** Cap 114 Laws of Kenya, is bestowed with powers to regulate licence, control the manufacture, importation, exportation, transportation, sale, repair, storage, possession and use of firearms, ammunition, airguns and destructive devices and other connected powers. According to him, once an Applicant submits an application for a firearm licence to his office, he is usually vetted thoroughly through the District Security Committee, the Provincial Security Committee and the office of the Commissioner of Police (read Inspector General of Police). In light of the foregoing, his office then only issues the firearm licence after receiving recommendations on the vetting and being fully satisfied that the Applicant has sufficient reasons to warrant issuance of the licence and the firearm licence once granted is subject to renewal annually and may be revoked anytime if his office is satisfied *inter alia* that the holder is unfit to hold and/or misuses the firearm. He deposed that any incident involving firearm use and/or misuse of a firearm is usually reported to his office by the Police Officers in charge of security in the particular region the earliest time possible to enable his office take the necessary action.
15. The deponent deposed that the Applicant herein had been licensed by his office to hold a firearm and as such, was subject to regulations of the ***Firearms Act*** and directions from the Office of the Commissioner of Police.
16. On or about 5th March 2012, his office received various reports on shooting incidents which had occurred 4th March 2012 within the Nairobi Area *inter alia* from the Provincial Police Officer, Nairobi. As per the reports, in one of the incidents, police at Ongata Rongai Police Station within Nairobi Area had on 4th March 2012 received a complaint that the Applicant herein had shot, injured and killed sheep and goats belonging to one **Jeremiah Ole Sunkuyia** and on receipt

thereof, the said police visited the scene of incident, arrested and disarmed the Applicant who was a licensed firearm holder.

17. According to the deponent, in the interest of preventing more harm to the public bearing in mind that the Applicant was armed with a lethal weapon, his office vide a letter dated 5th March 2012 revoked the Applicant's firearm licence and he was informed by the Investigating Officer, one **Police Constable Nyamwaga** based at Ongata Rongai Police Station within Nairobi Area, that the Applicant was on 5th March 2012 arraigned in Kibera Law Courts and charged with injuring animals contrary to Section 338 of the ***Penal Code***. However, on the date of hearing of the criminal matter, the complainant and other key witnesses though dully bonded failed and/or neglected to appear in court to testify wherein the court acquitted the Applicant under Section 202 of the ***Criminal Procedure Code***.
18. Later on, one of the complainants against the Applicant herein' one **Wilson Nkoronkoro** later was arrested, arraigned in court and charged with failing to attend court and give evidence wherein he pleaded guilty, was convicted and sentenced. It was therefore the deponent's view that the collapse of the criminal proceedings as against the Applicant cannot at all be blamed on the police as the police had discharged their duties dutifully to ensure the Applicant's prosecution and even later went an extra mile and prosecuted one of the complainants. According to him, as the applicant in his pleadings clearly admitted having used his firearm and shot at least three times on the fateful day, the shooting may have led to the death of the claimed animals hence the police and his office were justified in withdrawing the firearm and further revoking the licence as his being armed with the lethal weapon posed imminent danger to his person, his neighbours and the public at large. To the deponent, the applicant being a man of status having been an army officer and having held a firearm for twenty eight years as alleged, the Applicant's actions in the circumstances were not called for and ought to have conducted himself decently with patience while controlling his temper hence would not have engaged in the unlawful acts.
19. It was the deponent's view that if at all the applicant's actions were called for and he felt aggrieved by the decision of his office revoking the licence then he had and still has the right to appeal against the decision of the licensing board which right he has chosen not to exercise hence cannot be heard to claim that the acts of the police were arbitrary. He further contended that once a licence is revoked, the same ceases to exist and cannot be reinstated unless the Applicant is heard by way of an appeal to the licensing board. He asserted that the licence is already expired as it is renewable annually and the orders sought are not efficacious in the circumstances and if granted will be in vain as will amount to reinstating an invalid licence.
20. To him, the Applicant's application is an abuse of the court process and does not warrant Judicial Review remedies as the Applicant has no justiciable case against the Respondents.

Applicant's Submissions

21. On behalf of the Applicant, it was submitted by **Mr Odero**, his learned counsel, while reiterating the contents of the affidavit in support that the applicant could only challenge the decision after it had been taken. According to if the orders sought herein are granted, they would have the effect of restoring the *status quo ante*.

Respondents' Submissions

22. On behalf of the Respondents it was submitted on the issue of the notice that the firearm licence itself was sufficient notice since it contained conditions for revocation. Further section 5 of the ***Firearms Act*** is clear on the reasons for revocation and the applicant was well aware of the conditions attached to the issuance of the firearm and hence cannot claim not to have been given a fair hearing.
23. On the claim that there was no complaint against the applicant, it was submitted that the fact that a complaint was made and one of the complainant charged and convicted disproved this contention. The applicant's conduct, it was submitted justified the withdrawal of his firearm. In support of this submission the Respondents relied on **Jack Kaguu Githae vs. Attorney General & Another [2012] eKLR**.
24. As the licence in question had expired, the grant of the orders sought herein would be in vain, it

was so submitted. Based on **Republic vs. National Environmental Management Authority Civil Appeal No. 84 of 2010** and **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209**, it was submitted that the applicant ought to go for the most efficacious remedy since judicial review remedies are discretionary and may be refused even where the requisite grounds for their grant exist.

25. On the acquittal, it was submitted by **Ms Sirai**, learned counsel for the Respondents that the same was on a technicality as the witnesses who were bonded failed to turn up. To learned counsel the Board had the discretion to renew the licence or not to do so.
26. The Respondents consequently urged the Court to dismiss the application

Determinations

27. Section 5(7) of the ***Firearms Act***, Cap 114 of the Laws of Kenya provides:

> ***(7) A firearm certificate may be revoked by a licensing officer if—***
>
> ***(a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfitted to be entrusted with a firearm; or***
>
> ***(b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate.*** [Underlining mine].

28. This Court has had occasion to deal with the word "satisfied" in **Republic vs Kenya Forest Service Ex-parte Clement Kariuki & 2 Others [2013] EKLR,** where the Court held that **"t**he catchword in the above section is that the Board must be ***"satisfied"***. For the Board to be said to have been satisfied, it is my view that it must consider all the relevant factors."
29. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

> **"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."**

30. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003,** that where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield Vs. Minister of Agriculture and Fisheries [1968] HL.**
31. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** the Court expressed itself as follows:

> **"The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration**

of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution "in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property…….The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law…….. The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…… The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void……. The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…….. An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not direct himself in fact or law… It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, nolonger in occupation. It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

32. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity….. Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law……. It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in

bad faith."

33. The Respondent, however, submitted that since the conditions for the issuance of a firearm were contained in the licence itself and under section 5 of the ***Firearms Act***, the applicant was sufficiently notified of the same. In other words according to the Respondent there was no necessity to give any other notice apart from the said licence and the Act. In my view this argument was with due respect to the Respondent misconceived. Article 47(1) and (2) of the Constitution provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

34. What the Constitution requires in my view is not the notification of the general conditions for licensing and the circumstances under which the licence may be withdrawn but rather the notification of the reasons for the withdrawal of the license. The provisions of the Act or the contents of the licence cannot by any stretch of imagination amount to the reasons for the withdrawal of the licence the reasons therefor must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant licence holder to be heard on the circumstances alleged to constitute satisfactory reasons for the withdrawal of the licence.
35. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456,** it was held by the court of appeal as follows:

"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."

36. The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, the executive should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the executive is not one of the reasons upon which it is legally entitled to act, the Court is entitled to intervene since the action by the executive would then be based an irrelevant matter. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**
37. To hold that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.
38. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the learned Judge expressed himself as follows:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land ……regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe

to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them… Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. "

39. In this case, the Respondent's position was that various reports were received on shooting incidents which had occurred 4th March 2012 within the Nairobi Area *inter alia* from the Provincial Police Officer, Nairobi and in one of them, police at Ongata Rongai Police Station within Nairobi Area on 4th March 2012 received a complaint that the Applicant herein had shot, injured and killed sheep and goats belonging to one **Jeremiah Ole Sunkuyia** pursuant to which the said police visited the scene of incident, arrested and disarmed the Applicant who was a licensed firearm holder. To the respondent, the act of withdrawing the licence was informed by the need to prevent more harm to the public bearing in mind that the Applicant was armed with a lethal weapon. In my view before the applicant's licence could be withdrawn the Respondent had to be satisfied that the provisions of section 5(7) of the Act were satisfied. It is not just enough to contend that a complaint had been made against the applicant. That complaint had to be investigated a determination made as to whether the threshold under section 5(7) aforesaid was met. In this case, it was even more telling that the complainants themselves for reasons best known to them failed to appear in Court and adduce evidence in support of their case, an action which led to conviction of one of them. Therefore without specific finding made by the Respondent arrived at after complying with the rules of natural justice or a conviction from a Court of competent jurisdiction, the Court would have no option but to find that the decision made by the Respondent was arbitrary and without any legal basis. In other words the criteria that the respondent "***be satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfitted to be entrusted with a firearm***" cannot be said to have been met unless all relevant factors were considered which include the provision of section 5 of the Act and Article 47 of the Constitution which underpins the rules of natural justice.
40. On the issue of availability of other remedies, I only wish to refer to the decision in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) where it was held that when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance.
41. However, in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**
42. Section 5(4) of the ***Firearms Act*** provides:

A firearm certificate shall, unless previously revoked or cancelled, continue in force for one year from the date when it was granted or last renewed, but shall be renewable for a further

period of one year by a licensing officer, and so on from time to time, and the foregoing provisions of this section shall apply to the renewal of a firearm certificate as they apply to the grant of a firearm certificate.

15. In this case, it is clear that one year has lapsed since the applicant was granted a licence and the same has by operation of law lapsed. For the applicant to be granted a licence the provisions of section 5 of the said Act would have to be considered by the Respondent. To grant the instant applicant would have the effect of compelling the Respondent to exercise his discretion in a particular manner. However as was held in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR**:

"The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. *Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way*." [Emphasis mine]

43. In this case, the applicant has not sought an order compelling the Respondent to renew his licence. Therefore to compel the Respondent to return to the applicant the firearm without the licence being renewed would amount to compelling the Respondent to commit an act of illegality and the Court cannot by an order of mandamus compel the taking of an illegal act since mandamus only compels the taking of an action which the Respondent is legally bound to perform. In any case even if an order of mandamus was sought the Court could only grant an order compelling the Respondent to consider the applicant's application for renewal of the licence taking into consideration the factors enumerated under section 5 of the Act. That however, is not the application before me.
44. Therefore whereas I find that the prayer for certiorari is merited, the grant of the same is not efficacious in the circumstances and in the exercise of this Court's discretion I decline to grant the prayers sought herein.

Order

45. In the result I decline to grant the orders sought in the Notice of Motion dated 31st May, 2012 which I hereby dismiss. The costs of this application are however awarded to the applicant.

Dated at Nairobi this day 15th day of July, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for Ms Mbilo for the Respondent

Cc Kevin