REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 122 OF 2016

IN THE MATTER OF JUDICIAL REVIEW APPLICATION

BROUGHT PURSUANT TO ARTICLES 22, 23, 165 (3) (B) & 258

OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE ENFORCEMENT OF THE SUPERMACY OF

THE CONSTITUTION AS PER ARTICLE 2 (1 AND 4) OF THE CONSTITUTION

AND

IN THE MATTER OF THE BREACH OF THE NATIONAL VALUES

AND PRINCIPLES OF GOVERNANCE IN REGARDS TO

ARTICLE 10 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ENFORCEMENT OF THE FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLE 27 AND ARTICLE 47, 258 and 259

AND

IN THE MATTER OF DUTIES AND OBLIGATIONS OF STATE AND PUBLIC OFFICERS

AND

IN THE MATTER OF PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

H.E GOV. HASSAN ALI JOHO.....APPLICANT

AND

SAMUEL KIMARU - THE CHIEF LICENSING OFFICER

CENTRAL FIREARM BUREAU.....1ST RESPONDENT

FIREARMS LICENSING BOARD.....2ND RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....3rd RESPONDENT
THE INSPECTOR GENERAL OF POLICE.....4th RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th March, 2016, the ex parte applicant herein, **H.E Gov. Hassan Ali Joho**, seeks the following orders:

a. AN ORDER OF CERTIORARI to bring before this Honourable Court for purposes of being quashed and to quash the decision of the 1ST Respondent dated 10th March, 2016 purporting to revoke the Ex parte Applicants' firearm, firearm certificate No. 4773 and firearms namely refle 375 S/No. G1015273, Pistols S/No. CHH 692 and VFR 841 and all ammunition and directing the Ex parte Applicant to immediately surrender the firearm certificate.

b. Pending the hearing and determination of this application this Honourable Court do issue AN ORDER OF PROHIBITION prohibiting pending any or the intended arrest, charge and prosecution of the Petitioner herein GOV HASSAN ALI JOHO and to prohibit the Respondents one and all howsoever, themselves, their agents, servants and or assigns from arresting, confining and or detaining the Petitioner on the basis of the decision of the Firearms licensing officer or at all communicated vide a dated the 10th of March, 2016.

c. AN ORDER OF PROHIBITION prohibiting the 3rd Respondent herein THE CABINET SECRETARY FOR INTERIOR AND CO-ODINATION OF NATIONAL GOVERNMENT in any manner whatsoever from directing, continuing to direct, and harassing or continuing to harass the Ex parte applicant herein GOV HASSAN ALI JOHO howsoever, by himself, his agents, servants and or assigns on the basis of the decision of the Firearms licensing officer or at all communicated vide a dated the 10th of March, 2016.

2. The costs of this Application be in the Cause.

Applicants' Case

2. The application was based on the following grounds:

1) The decision of the 1st Respondent to revoke the firearm certificate of the applicant without being given a notice to show cause is *ultra vires*, illegal and therefore null and void.

2) The said decision is irrational and wednesbury unreasonable.

3) The decision goes against the legitimate and rightful expectations of the Ex Parte Applicant.

4) The decision is irrational, irrelevant and based on extraneous considerations.

5) The applicant has been a holder of a licensed firearm certificate since 18th June 2008 and for the entire period of 8 years from the date of issuance of the certificate, he has never breached the conditions specified under the certificate and neither has he engaged in arbitrary misuse of his firearms.

6) During the entire period of eight years, the applicant was never been notified of any intention to revoke his firearm certificate and neither has he been informed that he has suffered any disability to vitiate his ability to hold a firearm certificate.

7) The Applicant learnt through the media on 9th March 2016 that his firearm certificate No.4773 had been revoked. Out of caution, the applicant proceeded to the Mombasa regional police commander to verify whether the directive was true whereupon the police regional commander denied knowledge of such a directive.

8) On 10th March 2016, the Applicant received a letter dated the same day from the Chief Licensing officer informing him of the said revocation and directing him to surrender the firearm certificate forthwith to the Police Commander.

9) Further on 11th March 2016 the Interior Minister **Major Gen (Rtd) Joseph Nkaissery** through a press statement to the media ordered the applicant to immediately surrender this firearm certificate or face arrest despite knowing that the applicant had 14 days to comply pursuant to Section 5(8) of the Firearms certificate Act.

10) On 14th March 2016, the applicant through his Advocates lodged an appeal to the minister for interior and coordination of

National Government against the arbitrary revocation of his firearm certificate pursuant to section 5(8) of the Firearms certificate Act.

11) Under section 5(8) of the Firearms certificate Act, once an appeal is lodged, the revocation notice is forthwith stayed until the appeal is vacated, abandoned or dismissed.

12) Despite the clear provisions of section 5(8), and despite the appeal have been lodged and receipt acknowledged by the minister for interior and coordination of national government, both the Inspector general of Police and the Minister have continued to issue malicious threats of arrest to the applicant.

13) The Petitioner also being a public officer and the Governor for Nairobi County is a public figure whose address and aboard is well known to the Respondents and therefore no a flight risk.

14) It is in the interest of justice that the orders sought herein are granted.

3. According to the applicant, he is the Governor of Mombasa County and the Deputy Leader of the Orange Democratic Movement and a holder of three firearm certificates issued to him by the Chief Licensing Officer which certificates he has held for a period of eight (8) years.

4. The applicant disclosed that he learnt through the media on 9th March 2016 that his firearm certificate No.4773 had been revoked upon which Out of caution, he applicant proceeded to the Mombasa regional police commander to verify whether the directive was true whereupon the police regional commander denied knowledge of such a directive. However, on 10th March 2016, he received a letter dated the same day from the Chief Licensing Officer informing him of the said revocation and directing him to surrender the firearm certificate forthwith to the Police Commander. Further on 11th March 2016 the Interior Minister, **Major Gen (Rtd) Joseph Nkaissery**, through a press statement to the media ordered the applicant to immediately surrender this firearm certificate or face arrest despite knowing that the applicant had 14 days to comply pursuant to section 5(8) of the ***Firearms Certificate Act***.

5. The applicant averred that on the 11th of March 2016 at his offices at the Mombasa County Offices, he received from **Samuel Kimaru** a "Whatsapp" image of a letter dated 10th March 2016, signed by the Chief Licensing Officer informing him of the revocation of his said firearm certificates despite having not been notified of any intention to do so. In addition he was never asked to explain incidence or issue that could bring into question his suitability to hold a firearms certificate. Similarly, he had never been asked to show cause why his firearm certificates should be revoked.

6. It was averred that on 14th March 2016, the applicant through his Advocates lodged an appeal to the minister for interior and coordination of National Government against the arbitrary revocation of his firearm certificate pursuant to section 5(8) of the ***Firearms certificate Act***. To him, under that provision, once an appeal is lodged, the revocation notice is forthwith stayed until the appeal is vacated, abandoned or dismissed. In the meantime, he read SMS news alerts that stated that said Cabinet Secretary had said he must surrender his Firearms or be arrested.

7. He disclosed that despite that both the Inspector General of Police and the Minister continued to issue malicious threats of arrest to him notwithstanding the fact that being a public officer and the Governor for Mombasa County his address and aboard is well known to the Respondents and therefore not a flight risk.

8. To the applicant, the effect of an appeal against the decision of licensing officer is to suspend the operation of the said revocation and that in any event, the law gives his fourteen (14) days to comply with the surrender demand hence he could not be deemed to have committed any offence.

9. The applicant asserted that he had been a holder of a licensed firearm certificate since 18th June 2008 and for the entire period of 8 years from the date of issuance of the certificate, he had never breached the conditions specified under the certificate and neither has he engaged in arbitrary misuse of his firearms. During that period, he averred that he was never been notified of any intention to revoke his firearm certificate and neither had he been informed that he had suffered any disability to vitiate his ability to hold a firearm certificate.

10. He therefore was of the view that it was in the interest of justice that the orders sought herein are granted.

11. It was submitted on behalf of the applicant that the Chief Licensing Officer made a fundamental error of law in purporting to invoke section 5(7) which has ostensibly been modified by the ***Security Laws (Amendment) Act 2014*** whose objective was to "amend the laws relating to security" and the laws, which were cited and modified thereby, were therefore effectively repealed or amended to the extent provided by the Amendment legislation.

12. It was submitted that section 35 of the ***Securities Laws (Amendment) Act*** repeals and replaces section 3 of ***Firearms Act*** CAP 114 of the Laws of Kenya by establishing a Firearms Licencing Board that effectively replaces the Office of the Chief Licencing Officer, an office that under the Principal Act was filled through unilateral appointment by the Commissioner of Police. It was submitted that the Amendment legislation introduces under subsection 4 a saving provision for all serving Licencing Officers to act as part of officers forming the Secretariat of the Board but who are intended to act in accordance with the instructions of the Board. The functions of the Board include, among others, 4(5)(a) (as revised) to certify suitability of applicants and periodically assess proficiency of firearms holders; 4(5)(b) (as revised) to issue, cancel, terminate or vary any license issued under this Act.

13. It was therefore submitted that thus modified the limb upon which the Chief Licencing Officer purported to found his decision has been swept away by a subsequent parliamentary instruction hence the decision made in pursuance therefore, and any purported authority to reconsider that decision is invalid, ineffective and void of any legitimacy. Accordingly, it was submitted that this fundamental error of law

strips the purported decision of any legitimacy or validity. In this respect the applicant relied on the case of **Anisminic Ltd vs Foreign Compensation Commission [1968] APP.L.R. 12/17**, where House of Lords opined that a decision that is wrong in law, cannot amount to a decision at all by holding that:

> **"If the inferior tribunal, as a result of misconstruing the statutory description of the kind of case in which it has jurisdiction to inquire, makes a purported determination in a case of a kind into which it has no jurisdiction to inquire, its purported determination is a nullity."**

14. Further reliance was placed on **R vs Hannah Ndungu**, where this Court expressed itself as follows:

> **"As this Court has held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530 it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327, it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it."**

15. The applicant also relied on **Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] eKLR** where it was held that:

> **"Therefore where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. However, if Parliament gives great powers to them, the courts must allow them to it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and 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 tribunals or boards must act in good faith; extraneous considerations ought not to influence its actions; and it must not misdirect itself in fact or law."**

16. According to the applicant, in his letter and a fact repeated variously in several contexts and with varying degree of consistency, the Chief Licencing Officer purported to indicate that his decision was triggered by the Governor's unfitness to be trusted with a firearm. There is no indication whether in the letter by the Chief Licencing Officer or in the statements made in pursuance thereof to establish indicate that this fact was founded by any consideration of facts or circumstances. It was therefore submitted that the want of any foundation to support this fact which was fundamental to the Chief Licensing Officer's decision operates to make the decision fundamentally defective based on the absence of a fact which ought to have been a pre-condition to his authority.

17. In this regard the applicant relied on the decision of the House of Lords in **Kawaja vs. Secretary of State for the Home Department (1984),** a ruling which according to him, is authoritative of the position that the issue of whether a matter has to be established as a precondition for the exercise of an administrative power such fact must be determined prior to the exercise of such decision. In the reasoning of the House of Lords, the question "was a precedent or jurisdictional fact which, in case of deprivation of liberty, had to be proved to exist before any power to detain was exercisable at all."

18. To the applicant, the trigger on the power of the Chief Licensing Officer is the existence of a set of facts contemplated by statute, which must correspond with, and are statutorily pre-conditional and jurisdictional to his decision making powers. The facts must therefore be founded, material and relevant to his authority and absence of such facts begets want of authority contemplated in the statute and makes his decision erroneous, fanciful and invalid.

19. It was further submitted that the Chief Licencing Officer failed to accord the applicant rights guaranteed under Article 47 and the legitimate expectation for fairness and procedural propriety. It was contended that any person purporting to invoke administrative powers under stipulations of a statute or provided administratively, whether as modified by the Amendment Act or in its principal form, has a duty to scrupulously accord affected parties' consideration to ascertain proficiency or untrustworthiness for any reason. The Chief Licencing Officer however failed to exercise his assumed powers with the scruples stipulated under Article 47 and therefore acted unconstitutionally and unfairly. To the applicant, there is no reason cited on the face of the Chief Licensing Officer's letter or implied therein which indicate that he took sufficient measures to satisfy himself as to the applicant's temperament or unfitness for any other reason.

20. It was submitted that the Chief Licensing Officer's finding of unfitness of the applicant to be "entrusted" is irrational and not based on any material or relevant fact or circumstance. In this respect the applicant relied on the holding in **Patrick Kariungi vs. the Commissioner of Police and the Attorney General (Respondents) JR Misc. Civil Application No. 193 of 2012** where the court went at great length to articulate the onus of the Chief Licensing Officer to show that he is "satisfied" as to unfitness as contemplated under the Act. In the applicant's view, the Chief Licensing Officer's decision fell short of the legal threshold, subjectively considered irrelevant and immaterial circumstances, is procedurally defective and thus cannot be rubberstamped by the Court.

21. The applicant asserted that during the period that he has held the said firearms, he has not been involved in any incident, whether by conduct or omission, that would bring his worthiness in question and submitted that in making his decision, the Chief Licencing Officer and those we were moved by his purported authority like the Cabinet Secretary, unreasonably considered irrelevant matters or circumstances thereby making acting irrationally taking into consideration all the available facts and circumstances. His decision and the reasons cited are not justifiable as falling the range of options that could have been taken by a scrupulous senior public official guided by the principles stipulated under Article 10, 47 and 232 of the Constitution. To the applicant, the facts in this case are within the appropriate circumstances

where irrationality ought to be invoked. Reference was made to **Rooke's Case**, where **Coke LJ** opined:

> **"…..notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substances, between equity and colourable glosses and pretences, and not to do according to their wills and private affections."**

22. Based on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation (1948)**, it was submitted that unreasonableness as a ground of judicial review encompass many factors including bad faith, dishonesty, paying attention to irrelevant circumstances, disregard of the proper decision making procedure and relied in particular the decision of **Lord Green MR** that:

> **"A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters, which he is bound to consider. He must exclude from his consideration matters, which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority…."**

23. In conclusion, the applicant invited the Court to consider the facts and circumstances relating to this application, the applicable law and exercise its jurisdiction to grant prayers as sought by the applicant.

24. On the issue of the appeal to the Minister, it was submitted that as the Minister was leading the media frontline in proclaiming the illegitimate decision in this matter, the applicant had no choice to approach this court given the imminent threat of confinement and reasonable apprehension that his right to personal liberty was at risk. It cannot lie in the Ministers mouth to promise unbiased consideration given his advertent pronouncements. In the applicant's view, nothing short of the range of judicial declaration of the law and the statutory limits to their respective authority can point the respondents to the proper path of the law; unwind the apparent error of both law and fact; assert the legitimate expectation for exercise of public authority; cure the irrationality; and safeguard the applicant's rights.

Respondent's Case

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

> 1. The application as filed is premature and not suitable for determination by this Honourable Court; a reading of the provisions of **section 9(2)** of the ***Fair Administrative Action Act*** as read together with section 23 of the ***Firearms Act*** contemplates that court action must be preceded by recourse to statutory redress through administrative review by the Minister, which the applicant herein has already invoked and is pending determination.
>
> 2. That this Honourable Court in the circumstances ought to decline to exercise jurisdiction since the matter is before a competent legal forum for redress.
>
> 3. The present proceedings are contrary to express provisions of statute which do not contemplate that an impugned decision would be subjected to concurrent review; administrative review by the relevant Minister while at the same time undergoing judicial review by the court as the applicant is proposing to do in this application.
>
> 4. That the 1st Respondent was within his powers as provided for by section 5(7) of the ***Firearms Act*** to make the decision contained in the letter dated 10th March 2016.
>
> 5. That the application as drawn and taken out is incompetent and accordingly, ought to be dismissed forthwith with costs to the Respondents.

26. Apart from the aforesaid grounds, the Respondents filed a replying affidavit in which it was averred that by virtue of the provisions of section 5(7) of the ***Firearms Act***, the Chief Licensing Oficer revoked the *ex parte* applicant's firearm certificate No. 4773 vide a letter dated 10th March 2016. To him, the said revocation was not arbitrary, the reason informing it having been stated in the said letter namely that the *ex parte* applicant was unfit to be entrusted with a firearm anymore, a ground that is expressly provided for under section 5(7) of the ***Firearms Act***.

27. It was averred that further and contrary to the allegations by the applicant, the revocation notice does not embarrass the applicant or any individual for that matter as it is issued pursuant to the provisions of the law and that contrary to the allegations by the applicant, only material and relevant facts were considered in making the impugned decision of 10th March 2016.

28. While acknowledging that the applicant is a resident and Governor of Mombasa County he averred being aggrieved by the decision to revoke his firearm certificate, the *ex parte* applicant lodged an appeal with the 4th Respondent vide a letter dated 14th March 2016 as provided for under section 23 of the ***Firearms Act*** which appeal was yet to be determined and as such the present proceedings are premature by virtue of the provisions of section 9(2) of the ***Fair Administrative Action Act*** as read together with section 23 of the ***Firearms Act*** which contemplates that court action must be preceded by recourse to statutory redress which the applicant has already invoked. It was therefore contended that there being an appeal pending before a competent legal forum for redress, the Cabinet Secretary, the Court ought to decline to exercise its jurisdiction until the appeal is determined.

29. The Respondents asserted that the scheme of the ***Firearms Act*** is such that it does not provide for a hearing before the revocation of a

firearm due to the nature of the item controlled therein namely firearms but the opportunity to be heard is availed afterwards during the appeal process. It was therefore their case that the applicant would have an opportunity to show cause why his firearm certificate should not be revoked through the appeal that he has already lodged before the Cabinet Secretary.

30. The Respondents however appreciated that by virtue of the provisions of section 5(8) of the ***Firearms Act***, the notice of revocation dated 10th March 2016 has been stayed as the appeal has not been abandoned or dismissed hence applicant should first exhaust the statutory appeal process provided for in the ***Firearms Act*** before resorting to this Court.

31. On the part of the Respondents, it was submitted that the Constitution of Kenya recognizes the right to fair administrative action as a fundamental right under Article 47 of the Constitution. In line with the provisions of Article 261(1) of the Constitution on enactment of legislation governing particular matters provided for in the Constitution, Parliament enacted the ***Fair Administrative Action Act, 2015*** to give effect to Article 47 of the Constitution. In this regard the Respondents relied on section 9(2) of the ***Fair Administrative Action Act, 2015*** which provides that:

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

32. The Respondent also relied on sections 5(8) and 23 of the ***Firearms Act***. The former provides which provides as follows:

> ***In any case where a firearm certificate is revoked by a licensing officer, he shall by notice in writing require the holder to surrender the firearm certificate, and if the holder fails to do so within fourteen days from the date of the notice he shall be guilty of an offence and liable to a fine not exceeding one thousand shillings:***
>
> ***Provided that, where an appeal is brought against the revocation, this subsection shall not apply to that revocation unless the appeal is abandoned or dismissed, and shall in that case have effect as if for the reference to the date of the notice there were substituted a reference to the date on which the appeal was abandoned or dismissed.***

33. It was submitted that the import of the foregoing is that judicial review being a remedy of last resort should only be commenced upon exhausting all other available remedies unless the party so applying for judicial review orders has been granted specific exemption from the requirement for exhaustion of other available remedies in terms of section 9(4) of the ***Fair Administrative Action Act***. According to the Respondent, it is now a cardinal principle, a principle underpinned by statute, vide the provisions of section 9 of the ***Fair Administrative Action Act,*** that save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exists an alternative remedy.

34. In this respect the Respondent urged this Court to be guided by the Court of Appeal finding in the case of **Republic versus National Environment Management Authority *ex parte* Sound Equipment Ltd [2011] eKLR.**

35. The Court was therefore urged to be guided by the finding therein and find the present proceedings to be similarly incompetent. On the same point the Respondents relied on **National Oil Corporation Limited vs. Real Energy Limited & Another [2015] eKLR** and **Republic vs. Ministry of Interior and Coordination of National Government & Another *ex parte* ZTE Corporation & Another [2014] eKLR** and submitted that despite having lodged an appeal against the alleged arbitrary revocation of his firearm certificate pursuant to section 5(8) of the Act, on 15th March, 2016, the Applicant filed this application before the High Court challenging his intended arrest and subsequent revocation of his firearm certificate. It was submitted that this Court has no jurisdiction to hear and determine the present application by dint of the provisions of section 9(2) of the ***Fair Administrative Action Act*** as well as section 23 of the ***Firearms Act***. There being an appeal mechanism provided for in statute, the applicant ought to first exhaust the same before resorting to judicial review. Further, the applicant has not been granted any exemption under section 9(4) of the ***Fair Administrative Action Act*** from resorting to the available alternative remedies.

36. It was therefore the Respondents' submission that the application as filed is premature and not suitable for determination by this Honourable Court by virtue of the aforesaid provisions which contemplate that court action must be preceded by recourse to statutory redress which the applicant herein has already invoked and which is pending determination.

37. On the issue of the right to hearing the Respondents relied on section 5(7) of the ***Firearms Act.***

38. According to the Respondents, the applicant avers that he lodged an appeal with the Minister on 14th March 2016 which in effect suspends the provisions of section 5(8) in relation to surrendering the firearm certificate. It was further submitted that section 3 of the ***Firearms Act*** establishes the Firearms Licensing Board and section 3(5) outlines the functions of the Board.

39. According to the Respondents, whereas the Firearms Licensing Board has the power to *issue, cancel, terminate or vary* any license or permit that has been issued under the ***Firearms Act,*** as of 10th March, 2016 when the applicant's firearm was allegedly revoked, there was no Licensing Board as required by section 3 of the ***Firearms Act*** though the Cabinet Secretary has since set up the Board and the members of the Board have been Gazetted. On this issue therefore it was submitted that the 1st Respondent was within his powers as provided by section 5(7) of the ***Firearms Act*** to make the decision contained in the letter dated 10th March 2016 hence the decision cannot therefore be *ultra vires* the law if the maker was empowered to do so.

40. On the contention that the 1st Respondent's failure to give notice to the applicant before issuing the decision in the letter dated 10th March 2016 was illegal, the Respondents submitted that that there are several exceptions permissible in law to procedural fairness such as in the case of express statutory exclusion or where legislation expressly requires fairness in some situations, but is silent about others, or

fairness in form of disclosure would be prejudicial to public interest or where prompt action is needed or it is impractical to comply with fairness requirements.

41. On this issue it was the Respondents' submission that the process of revoking firearm certificates falls under such exceptions since the Act is silent about giving notice to the firearm holder before making such revocation. In any event, the applicant will have the opportunity to show cause why his firearm should not be revoked during the appeal procedure which right he has already exercised by lodging an appeal. Section 5(8) of the ***Firearms Act*** provides that in cases where an appeal is lodged the requirement of surrendering the firearm certificate within 14 days is suspended until such appeal is abandoned or dismissed.

42. The Respondents further submitted that the proceedings herein are wrongly intituled as they have not been brought in the name of the Republic as the applicant in judicial review applications is always the Republic rather than the person aggrieved by the decision sought to be impugned and relied on **Farmers Bus Service & Others versus Transport Licensing Appeal Tribunal [1959] EA 779** and **Rahab Wanjiru Njuguna versus Inspector General of Police & Another [2013] eKLR.**

43. It was further submitted that parties are bound by their pleadings and the applicant cannot purport to bring up statements at the submission stage when they were never pleaded in the pleadings and evidence adduced in their support and relied on **Independent Boundaries and Electoral Commission & Another versus Stephen Mutinda Mule & 3 Others [2014] e KLR** and the decision of the Nigerian Supreme Court in **Adetoun Oladeji (Nig) Ltd vs. Nigeria Breweries Plc** S.C. 91/2002 where it was held by **Pius Aderemi, J.S.C**. as follows:

> **"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."**

44. Other judges on the case expressed themselves in similar terms, with **Christopher Mitchell J.S.C.** rendering himself thus;

> **"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

45. As to whether the Chief Licensing Officer made a fundamental error of law in purporting to invoke section 5(7) which has ostensibly been modified by the Security Laws (Amendment) Act 2014, it was submitted that a thorough reading of the said ***Security Laws (Amendment) Act 2014*** does not repeal section 5(7) of the ***Firearms Act*** hence the said section is still in force as it has not been expressly repealed. In any event, the impugned decision was made on 10th March 2016 at which point the Firearms Licensing Board had not yet been constituted. The Firearms Licensing Board was constituted on 15th March 2016 when the CS, Interior appointed members to the Board vide Gazette Notice number 1619 to serve for a period of 3 years with effect from 16th March 2016. It was therefore the Respondents' submission that the 1st Respondent was well within his powers as provided by section 5(7) of the ***Firearms Act*** to make the decision contained in the letter dated 10th March 2016.

46. With respect to error of fact, procedural impropriety and unfair administrative action, it was submitted that as these grounds were not relied upon in the Amended Statutory Statement amended on 18th March 2016, the applicant cannot purport to introduce new grounds at the submissions stage as he is bound by his pleadings as this is contrary to the provisions of Order 53 Rule 4(1) are very clear as expounded by **Korir, J** in **Republic versus Kenya Bureau of Standards *ex parte* Powerex Lubricants Limited [2016] eKLR** where he stated as follows:

> **"The Respondent is indeed correct that Order 53 Rule 4(1) of the Civil Procedure Rules, 2010 provides that "...no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement." The application is thus confined to the grounds and relief contained in the statutory statement..."The Applicant is however guilty of introducing a new ground through the further affidavit. The Applicant alleges that the Respondent breached Section 14B(3) of the Act. This ground which is new was introduced without following the requirements of Order 53 Rule 4(2) of Civil Procedure Rules, 2010. However, there are grounds upon which the Applicant sought and obtained leave and those are the grounds which will determine the success or failure of the Applicant's case."**

47. On the grounds of irrationality and unreasonableness, it was submitted that the test for unreasonableness/irrationality has been laid out by the Courts and the Respondents relied on **Council of Civil Service Unions vs. Minister for the Civil Service [1984] 3 ALL ER 935** where **Lord Diplock** summarized the scope of judicial review thus:-

> **"By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"...(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."**

48. On the same issue the Respondents relied on **Rahab Wanjiru Njuguna vs. Inspector General of Police & Another [2013] eKLR** where this Court stated that:

> **'…….From the foregoing it is clear that where the authority whose decision is challenged displays 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 as where the decision is in defiance of logic and acceptable moral standards, the Court will interfere even if there is no illegality or procedural impropriety.'

49. To the Respondents, this decision is not defiance of logic and acceptable moral standards hence cannot be termed as irrational. In their view, there are several exceptions permissible in law to procedural fairness such as in the case of express statutory exclusion or where legislation expressly requires fairness in some situations, but is silent about others, or fairness in form of disclosure would be prejudicial to public interest or where prompt action is needed or it is impractical to comply with fairness requirements. Therefore, the 1st Respondent cannot be said to have been irrational since the process of revoking firearm certificates falls under such exceptions. The ***Firearms Act*** is silent about giving notice to the firearm holder before making such revocation. In any event, the applicant will have the opportunity to show cause why his firearm should not be revoked during the appeal procedure which right he has already exercised by lodging an appeal. Section 5(8) of the ***Firearms Act*** provides that in cases where an appeal is lodged the requirement of surrendering the firearm certificate within 14 days is suspended until such appeal is abandoned or dismissed.

50. It was therefore the Respondents' case that from the foregoing, and based on the facts, the law and the judicial authorities cited above, this court do find that the commencement of these proceedings during the existence of an appeal by the applicant renders these proceedings incompetent. Accordingly, we pray that you dismiss the present application with costs to the Respondents.

Determination

51. I have considered the issues raised in this application.

52. The first issue I wish to deal with is the competency of the application. It was contended on behalf of the Respondent that the proceedings herein are wrongly intituled as they have not been brought in the name of the Republic. It is true that the Motion filed herein is indicated to have been brought by **H. E Gov. Hassan Ali Joho** as the applicant. However, the applicant in judicial review applications is always the Republic rather than the person aggrieved by the decision sought to be impugned. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

53. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari, Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

"REPUBLIC……..……..……..APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

54. However in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

55. It follows that the improper intitulement is not necessarily fatal to an application for judicial review.

56. According to the Applicant, the Chief Licensing Officer made a fundamental error of law in purporting to invoke section 5(7) which has ostensibly been modified by the ***Security Laws (Amendment) Act 2014*** whose objective was to "amend the laws relating to security" and the laws, which were cited and modified thereby, were therefore effectively repealed or amended to the extent provided by the Amendment legislation.

57. It was submitted that section 35 of the ***Securities Laws (Amendment) Act*** repeals and replaces section 3 of ***Firearms Act*** CAP 114 of the Laws of Kenya by establishing a Firearms Licencing Board that effectively replaces the Office of the Chief Licencing Officer, an office that under the Principal Act was filled through unilateral appointment by the Commissioner of Police. It was submitted that the Amendment legislation introduces under subsection 4 a saving provision for all serving Licencing Officers to act as part of officers forming the Secretariat of the Board but who are intended to act in accordance with the instructions of the Board. The functions of the Board include, among others, 4(5)(a) (as revised) to certify suitability of applicants and periodically assess proficiency of firearms holders; 4(5)(b) (as revised) to issue, cancel, terminate or vary any license issued under this Act.

58. It was therefore submitted that thus modified the limb upon which the Chief Licencing Officer purported to found his decision has been swept away by a subsequent parliamentary instruction hence the decision made in pursuance therefore, and any purported authority to reconsider that decision is invalid, ineffective and void of any legitimacy.

59. Vide ***Kenya Gazette Supplement No.167 (Acts No.19)*** dated 22nd December, 2014, ***The Security Laws (Amendment) Act, 2014*** was by which several pieces of legislation were amended including the ***Firearms Act.*** The relevant portions of the said ***Gazette Supplement*** as appearing in sections 34 and 35 thereof were as follows:

> ***34. The Firearms Act is amended in section 2(a) by inserting the following new definition in proper alphabetical sequence-***
>
> ***"Board" means the Firearms Licensing Board established under section 3;***
>
> ***35. The Firearms Act is amended by repealing section***
>
> ***3 and replacing it with the following new section-***
>
> ***3. (1) There is hereby established the Firearms Licensing Board.***
>
> ***(2) The Board shall be appointed by the Cabinet Secretary and shall consist of a Chairman and-***
>
> ***(a) two representatives from the National Police Service one of whom shall be from the Directorate of Criminal Investigation;***
>
> ***(b) one representative from the Office of the Attorney-General;***
>
> ***(c) one representative from members group of registered gun owners;***
>
> ***(d) one representative from Wildlife Service:***
>
> ***(e) one representative from the National Intelligence Service; and***
>
> ***(d) one representative from the National Focal Point.***
>
> ***(3) There shall be a Secretariat of the Board which shall consist of such officers as may be necessary to discharge its duties under this Act.***
>
> ***(4) The persons serving as licensing officers immediately before the commencement of this section shall be deemed to be officers of the Secretariat referred to in subsection (3).***
>
> ***(5) The functions of the Board shall be to***
>
> ***(a) certify suitability of applicants and periodically assess proficiency of firearms holders:***
>
> ***(b) issue, cancel, terminate or vary any licence or permit issued under this Act;***
>
> ***(c) register civilians firearm holders, dealers and manufacturers of firearms under this Act;***
>
> ***(d) register, supervise, and control all shooting ranges that are registered under this Act;***
>
> ***(e) establish, maintain and monitor a centralized record management system under this Act;***
>
> ***(f) perform such other functions as the Cabinet Secretary may prescribe from time to time.***

60. Before this amendment section 3 of the ***Firearms Act*** was expressed in the following terms:

> ***The Commissioner of Police shall, by notice in the Gazette, appoint a chief licensing officer to perform the duties and exercise the powers imposed and conferred by this Act, and may appoint any number of licensing officers, who shall be subject to the directions of the chief licensing officer.***

61. Section 5(7) and (8) of the same Act, on the other hand provides as follows:

> ***(7). A firearm certificate may be revoked by a licensing officer if—***
>
> > ***(a) the licensing officer is satisfied that the holder is prohibited by or under this Act from possessing a firearm to which the firearm certificate relates, or is of intemperate habits or unsound mind, or is otherwise unfitted to be entrusted with a firearm; or***
> >
> > ***(b) the holder fails to comply with a notice under subsection (5) requiring him to deliver up the firearm certificate.***
>
> ***(8) In any case where a firearm certificate is revoked by a licensing officer, he shall by notice in writing require the holder to surrender the firearm certificate, and if the holder fails to do so within fourteen days from the date of the notice he shall be guilty of an offence and liable to a fine not exceeding one thousand shillings.***
>
> ***Provided that, where an appeal is brought against the revocation, this subsection shall not apply to that revocation unless the appeal is abandoned or dismissed, and shall in that case have effect as if for the reference to the date of the notice there were substituted a reference to the date on which the appeal was abandoned or dismissed.***

62. It is important to point out that this Gazette Supplement was the subject of challenge in **Petition No.628 of 2014 - Coalition for Reform and Democracy (CORD) & Others vs. Attorney General & Others.** By its judgement dated 23rd February, 2015, a five judge bench of this Court found that certain sections of the said Amendment Act were indeed unconstitutional. However the above sections were not affected. It therefore follows that the said sections are valid.

63. According to the said Amendment Act, the date of commencement of the said Amendment Act was 22nd December, 2014. The Respondent however contends that a thorough reading of the said ***Security Laws (Amendment) Act 2014*** does not repeal section 5(7) of the ***Firearms Act*** hence the said section is still in force as it has not been expressly repealed. In other words the Respondents contend that both the Firearms Licensing Board and the Chief Licensing Officer are well within their powers to revoke a firearms licence. Whereas it is true that section 5 of the said Act was, for reasons unknown to this Court, not repealed, it is clear that pursuant to the Amendment Act, persons serving as licensing officers immediately before the commencement of the Act as amended were deemed to be officers of the Secretariat. Can it be argued that the power to issue firearms permits as well as to revoke the same can be exercised either by the Board or by a licensing officer? To answer this one needs to interrogate the intendment of the amendments. In my view what the Act intended to cure were the loopholes which hitherto existed in entrusting a single individual with the responsibility of issuing firearms certificates and revoking the same. The amendments were intended to ensure that those who apply for issuance of such certificates in light of the then run-away insecurity were vetted by a Board rather than an individual.

64. It is therefore my view that the powers which had hitherto been given to the licencing officers as individuals were henceforth to be exercised by the Board where there was an inconsistency in the exercise thereof. My view is supported by the principle of interpretation that if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act. See ***Maxwell on Interpretation of Statutes, 10th Ed at Page 162;*** **Kariapper vs. Wijesinha [1968] AC 716; Godwin vs. Phillips [1908] AC 7 CLR 1.**

65. It was further contended that in any event, the impugned decision was made on 10th March 2016 at which point the Firearms Licensing Board had not yet been constituted and that in fact the Firearms Licensing Board was constituted on 15th March 2016 vide Gazette Notice number 1619 to serve for a period of 3 years with effect from 16th March 2016. It was therefore the Respondents' submission that the 1st Respondent was well within his powers as provided by section 5(7) of the ***Firearms Act*** to make the decision contained in the letter dated 10th March 2016.

66. Section 22 of the ***Interpretation and General Provisions Act,*** Cap 2 Laws of Kenya provides as follows:

> ***Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation.***

67. As to when a law comes into operation sections 9(1) and (3) of Cap 2 provide that:

> ***9. (1) Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.***
>
> ***(3) If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly.***

68. In this case the commencement date was clearly and expressly indicated as 22nd December, 2014. Therefore by the time the impugned decision was being taken the amendments were in operation and the repealed provisions either expressly or impliedly had ceased to exist.

69. It is therefore my view and I so hold that the decision by the 1st Respondent to revoke the applicant's licence was without or in excess of

jurisdiction.

70. It was however contended that this particular ground was not one of the grounds which were relied upon in the statement. I appreciate that Order 53 Rule 4(1) of the ***Civil Procedure Rules*** provides that:

> **"...no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."**

71. In my view where the ground relied upon is an irregularity or error on a point of law that renders the impugned decision unlawful, the failure to expressly state the ground would bar the applicant from relying thereon. Where however the ground in question goes to the jurisdiction and renders the decision a nullity, that is another matter altogether. In that case the decision would be null and void. This is in line with the celebrated decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169** at **1172** to the effect that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

72. A similar position was adopted by **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others *ex parte* Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** in which he held 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.

73. This Court cannot therefore sit back, fold its arms and close its eyes when its attention has been brought to an act undertaken without or in excess of jurisdiction. It is in such circumstances that the Court ought to invoke the provisions of Article 159(2)(d) of the Constitution and ensure that justice is administered without undue regard to procedural technicalities as long as in so doing the rules of natural justice are adhered to and the parties are afforded an opportunity to address the Court on that ground. In this case, the Respondent was put on notice in good time that this ground was going to be relied upon. Accordingly it is my view that this Court is entitled to take that ground into consideration.

74. In this case, it is submitted that the Respondent committed an error of fact since there was no material upon which the decision to revoke the applicant's firearm licence could be based. This Court has had occasion to deal with the 1st Respondent's powers under section 5(7) of the ***Firearms Act*** and in particular the term "satisfied" in **Republic vs. Kenya Forest Service Ex-parte Clement Kariuki & 2 Others [2013] eKLR,** where the Court held that:

> **"the 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."**

75. 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."**

76. 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.**

77. 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."

78. 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."

79. In **Patrick Kariungi vs. the Commissioner of Police and the Attorney General (Respondents) JR Misc. Civil Application No. 193 of 2012** this Court expressed itself *inter alia* as follows:

"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.

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."

80. In this case apart from a bald and bare statement that the *ex parte* applicant was unfit to be entrusted with a firearm anymore, no attempt was made to explain why the 1st Respondent formed the view that this was so. In other words there is no evidence of the factual considerations that went into arriving at the said decision. ***Judicial Review Handbook*** by **Michael Fordham**, 6th Edn. pages 526-529 deals with the duty by an administrative body to sufficiently acquaint itself with the relevant information, fairly presented and properly addressed and states that a body has a basic duty to take reasonable steps to acquaint itself with relevant material. In that work the author cites In **R vs. Secretary of State for Home Department, exp Iyarudai [1998] Imm AR 47, 475**, where **Lord Woolf** posed the question whether the Secretary of State had properly considered the information which was available to him and come to the opinion which was consistent with that information recognising that it was his responsibility to evaluate the material which was available to him. In the same work the author cites **R vs. Secretary of State for Home Department, exp Ajayi**, where the Court recognised the duty to balance the relevant factors and not just to take them in mind.

81. In this case, the Respondents have not disclosed the nature of the information they received that informed them in arriving at the decision that the *ex parte* applicant was unfit to be entrusted with a firearm anymore. In absence of such disclosure one can only conclude that the

decision was arbitrarily arrived at. I therefore agree with the applicant that the trigger on the power of the Chief Licensing Officer is the existence of a set of facts contemplated by statute, which must correspond with, and are statutorily pre-conditional and jurisdictional to his decision making powers and that the facts must be founded on material and relevant to his authority and absence of such facts begets want of authority contemplated in the statute and makes his decision erroneous, fanciful and invalid.

82. On the contention that the 1st Respondent's failure to give notice to the applicant before issuing the decision in the letter dated 10th March 2016 was illegal, the Respondents submitted that that there are several exceptions permissible in law to procedural fairness such as in the case of express statutory exclusion or where legislation expressly requires fairness in some situations, but is silent about others, or fairness in form of disclosure would be prejudicial to public interest or where prompt action is needed or it is impractical to comply with fairness requirements. In my view the position in cases where the statute is silent on whether the person who stands to be adversely affected by the decision was restated in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself 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...*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*."** [Emphasis mine].

83. It is therefore clear that unless the application of the rules of natural justice in an administrative action is expressly excluded, the same are deemed to apply. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. Pursuant to this Article Parliament enacted the ***Fair Administrative Action Act, 2015*** which provides in section 4(6) as follows:

> ***Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.***

84. What this provision provides is that Article 47 of the Constitution applies unless its application is excluded by a written law and even so, such law must be in conformity with Article 47 of the Constitution. In this case there is no evidence that such law exists.

85. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."**

86. In **Selvarajan vs. Race Relations Board [1976] 1 All ER 12** at page 19 **Lord Denning MR** observed that:

> **"In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the**

preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."

87. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

88. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

89. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade** in his book ***Administrative Law*:**

"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…"

90. It was contended that the applicant ought to have followed the appellate process to its completion before instituting these proceedings. Section 23 of the ***Firearms Act*** provides as follows:

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.

91. It is however contended, which contention is not denied that on 11th March 2016 the Interior Minister, **Major Gen (Rtd) Joseph Nkaissery**, through a press statement to the media ordered the applicant to immediately surrender this firearm certificate or face arrest despite knowing that the applicant had 14 days to comply pursuant to section 5(8) of the ***Firearms Act***. In my view by issuing the said statement when the Minister knew or ought to have known that an appeal would probably be made to him, rendered him unsuitable to sit over the said appeal. The Minister ought to have held his horses until the expiry of the period for appealing before going public on the issue. By so reacting the Minister clearly overreached himself.

92. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that 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."

93. It is however my view that whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action since there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial. In a case where an appellate tribunal has jumped the gun by entering the arena before the appeal is placed before it, it cannot be said that in those circumstances the appellate process would be more convenient, effective and beneficial than the judicial review process. In my view those are the kind of circumstances that would justify a finding of the existence of exceptional circumstances. As was held in **Republic vs. National Environment Management Authority [2011] eKLR:**

> **"The principle running through these cases is where there was an alternative remedy and especially where Parliament had 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 was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."**

94. In my view, by prematurely commenting on the matter before the same was placed before him, the Minister clearly showed that the applicant was unlikely to receive a fair hearing before him. This was contrary to Article 50 of the Constitution which provides that:

> ***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

95. In other words the Minister had manifested an intention to contravene the Constitution and in particular the Bill of Rights hence the applicant was justified in bypassing the appellate process and invoking this Court's supervisory jurisdiction. For the umpteenth time I wish to draw the attention of the executive to the decision of **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** where he cautioned that:

> **"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under the Bill of Rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just been sworn in and agreed to be guided by the provisions of the Constitution can allow his agents to breach it with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved...*Prima facie* the allegations contained in this application is serious indictment on the institution of the Presidency and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government."**

96. *I must emphasise that Kenya is a democratic state. The preamble to our Constitution recognises* the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Similarly, Article 10(2)(a) identifies democracy as one of the values and principles of governance which binds all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. As was held by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77**:

> **"We recognize and we are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions is the High Court and where permissible, with an appeal to the Court of Appeal. Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed...The courts must continue to give justice to all and sundry irrespective of their status or former status."**

97. When a country opts to follow the path the democracy it must be prepared not only to enjoy the fruits therefor but must also be prepared to pay the cost of doing so. As the Court of Appeal appreciated in **Judicial Commission of Inquiry Into the Goldenberg Affair & 3 Others vs. Job Kilach Civil Application No. Nai. 77 of 2003 [2003] KLR 249**:

> **"Democracy is normally a messy, and often times, a very frustrating, way of governance. In this respect, dictatorships are more efficient."**

98. We have made a bed and we must lie on it however some people may feel uncomfortable with it. This is the message in Article 2(1) of the Constitution where it is provided that:

> ***This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***

99. As a parting shot I wish to restate this Court's view in **Bryan Yongo vs. Chief Licencing Officer & 3 Others [2014] eKLR** that:

> **"…a** ***firearm is not a toy. It is a very lethal weapon and as such ought not to be brandished anyhow as if it were a swagger***

stick or a flywhisk. Those who are privileged to be licensed to hold firearms must exercise utmost responsibility and must guard against careless use of the firearm. Therefore firearm licences ought to be granted only in situations where it is necessary to do so and where the strict conditions for its grant are fulfilled. A firearm in my view is not a symbol of power and ought not to be issued to those who simply want to use the same to intimidate other members of society or to throw their weights around. Where a grantee or licensee of firearm certificate abuses the privilege the same ought to be speedily withdrawn before the society is exposed to the perils and vagaries of firearm abuse."

100. Such action must however be taken in accordance with the due process of the law. I have said enough to show that the ex parte applicant's application is merited.

Order

101. It follows that the Notice of Motion dated 18th March, 2016 succeeds and I grant the following orders:

a. An order of certiorari bringing into this Court for purposes of being quashed the decision of the 1st Respondent dated 10th March, 2016 purporting to revoke the Ex parte Applicants' firearm, firearm certificate No. 4773 and firearms namely refle 375 S/No. G1015273, Pistols S/No. CHH 692 and VFR 841 and all ammunition and directing the Ex parte Applicant to immediately surrender the firearm certificate which decision is hereby quashed.

b. An order prohibiting the 3rd Respondent herein the Cabinet Secretary for Interior and Co-Ordination of National Government in any manner whatsoever from directing, continuing to direct, and harassing or continuing to harass the Ex parte applicant herein Gov Hassan Ali Joho howsoever, by himself, his agents, servants and or assigns on the basis of the decision of the Firearms licensing officer or at all communicated vide a dated the 10th of March, 2016.

102. As the application was not properly intituled, there will be no order as to costs.

103. Orders accordingly.

Dated at Nairobi this 16th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oluoch for the Applicant

Miss Maina for the 1st, 2nd, 4th and 5th Respondents

CA Mwangi