



**Chonga v National Police Service & 2 others; Firearms Chief Licensing Officer (Interested Party) (Petition E294 of 2023) [2024] KEHC 5624 (KLR) (Constitutional and Human Rights) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5624 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E294 OF 2023  
LN MUGAMBI, J  
MAY 23, 2024**

**BETWEEN**

**HON. RICHARD KEN CHONGA ..... PETITIONER**

**AND**

**NATIONAL POLICE SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**FIREARMS CHIEF LICENSING OFFICER ..... INTERESTED PARTY**

**RULING**

1. By way of a Notice of Motion application dated 14<sup>th</sup> August 2023, the Applicant seeks orders that:
  - i. Spent.
  - ii. Pending the hearing and determination of this Application interpartes, this Court be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to restore the Applicant's firearms; Beretta Pistol S/No. A003776Z, MAG, /3 RDS, Holster, FC and Red Card FC002063 and his firearms certificates.
  - iii. Pending the hearing and determination of this Application interpartes, conservatory orders be issued with the effect that the 2<sup>nd</sup> Respondent be compelled to restore the security, Firearms and/or close protection services of the Applicant with immediate effect.



- iv. Pending the hearing and determination of the Petition, this Court be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to restore the Applicant's firearms; Beretta Pistol S/No. A003776Z, MAG, /3 RDS, Holster, FC and Red Card FC002063 and his firearms certificates.
  - v. Pending the hearing and determination of the Petition, conservatory orders be issued with the effect that the 2<sup>nd</sup> Respondent be compelled to restore the security, firearms and/or close protection services of the Applicant with immediate effect.
  - vi. Any other appropriate reliefs that the court deems fit and just to grant
2. The application is based on the grounds set out therein and is supported by the Applicant's affidavit also sworn on 14<sup>th</sup> August 2023.

### **Applicant's Case**

3. The Applicant is a Member of Parliament for Kilifi South Constituency elected under the Orange Democratic Movement Party. He averred that State Officers are entitled to protection and security from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This prerogative is in line with Part 4.0(g) of the Policy on Provisions of Protective Security to VIPS and other State Officers.
4. Further, by dint of Section 5 of the Firearms Act, he applied for a Firearm License to the Firearms Licensing Board, which he was granted. He has been in possession of firearms and ammunition for about 10 years. For this reason, he contends that he had a legitimate expectation that his license and security services would continue without interruption save for lawful reasons.
5. On 11<sup>th</sup> August 2023, contrary to this expectation, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents withdrew his security officers and also confiscated his firearms, Beretta Pistol S/No. A003776Z, MAG, /3 RDS, Holster, FC and Red Card FC002063. He stated that other than the Ksh.73,000 fine he paid as a fine for late renewal of his firearm license, he was not informed of any crime he had committed. Moreover, that out of the persons who were fined for late payment, only his firearms were confiscated.
6. He is aggrieved that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions were done without any prior notice or reasons being given. He also states that he did not commit any unlawful act to justify the Respondents actions. Even so, he argues that he committed crime which has been established by the Respondents.
7. Consequently, he contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's actions are malicious and done in bad faith. Correspondingly, that the actions are unlawful, unreasonable and a flagrant abuse of authority and in breach of his constitutional rights under Articles 27, 47 and 50(2) of the Constitution. Equally in breach of Article 245(2)(b) and (4) of the Constitution which obligates the 1<sup>st</sup> Respondent to carry out its mandate independently and impartially.
8. The Applicant submitted that following withdrawal of security and firearm, he is apprehensive about his safety and security as the nature of his duties render him susceptible to security risks. He similarly is anxious owing to the alleged Government threats to persons affiliated with Azimio La Umoja One Kenya Coalition Party. For this reason, he urges the Court to grant the orders sought.

### **Respondents' case**

9. The Respondents filed grounds of opposition dated 22<sup>nd</sup> August 2023. Their objection is based on the grounds that:
  - i. The Petition and Notice of Motion application is premature and is based on a misconception of the law.



- ii. The Applicant has failed to exhaust the remedies available to them under the *Firearms Act* Cap 114 Laws of Kenya and therefore this Court should dismiss the Application as filed as offends Section 9 (2) of the *Fair Administrative Action Act*.
- iii. The application offends the provision of Section 23 of the *Firearms Act*.
- iv. The Application forms a classical description of an abuse of the due process of the court.

### **Applicant's Submissions**

10. The Applicant in the submissions dated 9<sup>th</sup> October 2023 filed by Danstan Omari and Associate Advocates submitted on the issue of whether the application offends the doctrine of exhaustion and whether the Court should grant the orders sought.
11. On the first issue, Counsel argued that Section 23 of the *Firearm Act* which is alluded to, only refers to disputes in relation to licensing. As the Applicant issue is without a remedy under the dispute resolution procedure provided for in the *Act*. That this dispute is not about his firearm license but the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's failure to give a reason for confiscating his firearms. For this reason, he argues that there was no dispute resolution mechanism for him to exhaust before approaching this court. Nonetheless, Counsel submitted that Section 9(4) of the *Fair Administrative Action Act* also envisages exceptional circumstances in view of the doctrine of exhaustion.
12. Moving to the next issue, Counsel submitted that the Applicant being compliant with the Rules and Regulations for owning Firearms, he had a legitimate expectation that he would continue possessing his firearm. Counsel noted that this compliance was evidenced by the Applicant's continual renewal of his firearm license by the Firearms and Licensing Board. Moreover, no plausible criminal act or breach of the Rules was established by the Respondents.
13. Considering this, Counsel argued that the Respondents' act of failing to issue prior notice and reasons for confiscating the weapon violated Article 47 of the *Constitution*. Reliance was placed in *Geothermal Development Company Limited vs. Attorney General & 3 Others* (2013) eKLR where it was held that:
 

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2<sup>nd</sup> edition, at page 272, notes that, ‘Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision’...Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information.”
14. Like dependence was placed in *Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board* (2016) eKLR.
15. Counsel is convinced therefore that the Respondents actions were politically instigated so as to bar the Applicant from carrying out his official duties. Further to intimidate him owing to his affiliation with



the Azimio la Umoja One Kenya Coalition party. Accordingly, Counsel asserted that the circumstances of this case necessitate issuance of the sought orders.

### **Respondents' Submissions**

16. In the submissions dated 19<sup>th</sup> October 2023, State Counsel Stephen Terrell for the Respondents submitted that the Petition was erroneously disguised as a constitutional matter. This is since the Petitioner in view of *Anarita Karimi Njeru v Republic* (No.1) (1979) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights alliance* (2014) eKLR had failed to provide the particulars of the alleged complaints and demonstrate the manner of the alleged infringements.
17. Furthermore, it was submitted that the Applicant in view of Section 23 of the *Firearms Act* had failed to exhaust the prescribed dispute resolution mechanism therein. This is in accordance with Section 9(2) and (3) of the *Fair Administrative Action Act*.
18. Reliance was placed in *Republic v Kenyatta University Ex parte Ochieng Orwa Dominick & 7 others* (2018) eKLR where it was held that:

“Section 9 (2) of the *Fair Administrative action Act* 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. Also relevant is sub-section (3) which provides that 'the High Court or a subordinate Court hall, if it is not satisfied that the remedies referred to in uh-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”
19. Equal reliance was also placed in *Republic v Firearms Licensing Board & another Ex Parte Stephen Vincent Jobling* (2019) eKLR and *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* (2008) eKLR.
20. Counsel further submitted that the Respondents actions were premised on the Applicant's breach of the provisions of the National Police Service Policy on the Provision of Protective Security of VIPS and Other State Officers 2016 which he conveniently failed to disclose. Basically, that VIP protection will not be accorded to persons who have been convicted of a criminal offence and committed a breach of the peace. Accordingly, it is argued that the Respondents carried out their duties in accordance with the law.

### **Analysis and Determination**

21. Upon careful examination of the pleadings and submissions herein, this Court finds the following to be the issues for determination in the instant Notice of Motion Application dated 14<sup>th</sup> August, 2023:
  - i. Whether there is breach of the doctrine of exhaustion.
  - ii. Whether this Court should grant the Conservatory Orders, pending determination of this suit.

### **Whether there is breach of the Doctrine of exhaustion**

22. The exhaustion doctrine ensures that a party utilizes alternative dispute resolution mechanism provided for redressing their disputes prior to approaching the Courts for resolution. The principle



has been upheld in many judicial decisions. In *Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others* (2015) eKLR, the Court of Appeal elaborated the principle thus:

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

23. This principle is statutorily captured under the *Fair Administrative Actions Act*, No. 4 of 2015, Section 9 (2) and (3) as follows:

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

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

24. The law, however, recognizes that there may be exceptions as was held in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested parties)* (2020) eKLR where the Court stated as follows:

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is



especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

25. The question is whether non-exhaustion of remedies principle applies. My view is that whether or not the principle of exhaustion applies, that is a substantive question that can be properly raised in respect of the entire Petition. If the Court tackles this particular question as against the Petitioner’s application for a conservatory order, what happens if it finds that there is a breach of the principle of exhaustion of remedies? Can it then proceed to dismiss the entire Petition in the ensuing ruling in respect of the application for conservatory order? That is highly irregular and unfathomable. There being no substantive application made to strike out the Petition or a Preliminary Objection by the Respondent in this regard, I decline the invitation to a matter that goes to the substratum of the petitioner lest the Court will be left stranded with the findings should it find in the affirmative. An issue that touches on the competence of the Petition should be raised substantively through separate application; or as response to the Petition itself. For this reason, I decline to walk that path and refuse to make any conclusion on this particular legal issue at this stage.

### **Whether Conservatory Order should issue**

26. The applicable principles on grant of conservatory Orders are now well settled. In *Mwaniki Gachuba & 10 others vs County Government of Embu & 2 others* (2021) eKLR the Court observed as follows:

“20. The applicable principles for the grant of a conservatory order were detailed by Onguto J. in *Board of Management of Uhuru Secondary School –vs- City County Director of Education & 2 Others* [2015] eKLR. In summary, the principles are that the applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

27. Correspondingly, in *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR the Court opined as follows:

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”

28. Further, the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others* (2014) eKLR guided as follows:

“(85) These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in



a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

- (86) “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

29. Moreover, the Court in *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* (2020) eKLR summarized the threshold for the grant of the conservatory orders as follows:

- “24. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:
- a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
  - b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”

30. The Applicant case is that following withdrawal of security and firearm, he is apprehensive about his safety and security as the nature of his duties render him susceptible to security risks. He was similarly anxious owing to the alleged Government threats to persons affiliated with Azimio La Umoja One Kenya Coalition Party.

31. On whether or not the applicant has established a prima facie case, the applicant has to surmount the hurdle that his case for reinstatement of the firearm ought not to be considered in this court on account of the principle of exhaustion of remedies which, in my view is not an idle contention given the provisions of Section 23 of the *Firearms Act*.

32. As to whether the Petition will be rendered nugatory should this Court fail to grant the conservatory order, I do not think so. It is noteworthy that the Petitioner’s police security was reinstated on an



interim basis until the hearing of the Petition on 24.8.2023. In the meantime, therefore, the Petitioner/ Applicant's security concerns are being catered for to that extent and the Petitioner is thus not overly exposed for now. The only major issue that remains therefore is the one touching on the withdrawal of his firearm. This court considers that it is necessary to grant the parties a hearing so that the matter can be decided on merits.

33. Consequently, the Court finds that the threshold for issuance of conservatory orders in regard to the reinstatement of firearm which is the remaining limb in the application has not been satisfied and is thus declined. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

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**L N MUGAMBI**

**JUDGE**

