



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION

MISC. JUDICIAL REVIEW APPLICATION NO. 211 OF 2018

NEW FLAMINGO HARDWARE & PAINTS LIMITED.....1ST APPLICANT
HANG SHUN INTERNATIONAL CO. LTD.....2ND APPLICANT
TOKYO TRADING GLOBAL LIMITED.....3RD APPLICANT
KINGSWAY TYRES LIMITED.....4TH APPLICANT
TRIBE HOTEL LIMITED.....5TH APPLICANT
CREATIVE INNOVATIONS LIMITED.....6TH APPLICANT
NAGDA PRABHULAL.....7TH APPLICANT
XIONG YING IMPORT & EXPORT CO. LTD.....8TH APPLICANT
WORLD BRANDS (K) LTD.....9TH APPLICANT
TONONOKA FIREWORDS LTD.....10TH APPLICANT
MAHESH & TIRTH CONSTRUCTION LTD.....11TH APPLICANT
GREENHILLS INVEST LTD.....12TH APPLICANT
SHRI KRISHANA BHIMJI HIRANI.....13TH APPLICANT
VIVA-LINE LTD.....14TH APPLICANT
METRO PHARMACEUTICALS LTD.....15TH APPLICANT
READY TIMBER MERCHANTS LTD.....16TH APPLICANT
DHIRAJ KUMAR BHIMJI HIRANI.....17TH APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY.....1ST RESPONDENT
THE COMMISSIONER GENERALKENYA REVENUE AUTHORITY.....2ND RESPONDENT
THE COMMISSIONER, INVESTIGATIONS AND ENFORCEMENT KENYA

REVENUE AUTHORITY.....3RD RESPONDENT
THE DIRECTOR, DIRECTORATE OF IMMIGRATION AND REGISTRATION
OF PRESONS.....4TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

-CONSOLIDATED WITH-

NAIROBI HIGH COURT MISC. JUDICIAL REVIEW APPLICATION NO. 185 OF 2018

STEELSTONE LIMITED.....1ST APPLICANT
CARTON MANUFACTURERS.....2ND APPLICANT
TRANSPACIFIC LIMITED.....3RD APPLICANT
HALL EQUATORIAL LIMITED.....4TH APPLICANT
MERIDIAN HOLDING LIMITED.....5TH APPLICANT
CRESCENT DISTRIBUTORS SERVICES LTD.....6TH APPLICANT
CRESCENT TECH LTD.....7TH APPLICANT
PERKINGS AMBALAL PATEL T/A CHAMPIONS AGENCIES.....8TH APPLICANT
SPECTRE CHEMICALS LIMITED9TH APPLICANT
NAKURU PLASTICS LIMITED.....10TH APPLICANT
AADEEM TRADING COMPANY LTD.....11TH APPLICANT
KEROMATT LTD.....12TH APPLICANT
SAFARI CONNECT LTD.....13TH APPLICANT
ANAND COMMUNICATIONS LTD.....14TH APPLICANT
HOTCELL ENTERPRISES LTD.....15TH APPLICANT
SMARTPONE STORES LTD.....16TH APPLICANT
SRIMAN TRADING CO. LTD.....17TH APPLICANT
THREE A CONSTRUCTION LTD.....18TH APPLICANT
ARJUN MORARJITHAKAR.....19TH APPLICANT
SAWLA ENTERPRISES LTD.....20TH APPLICANT
SHANIR DISTRIBUTORS LTD.....21ST APPLICANT
CANDY LAND LTD.....22ND APPLICANT
RAMESH HARILALGHAGHADA.....23RD APPLICANT

-VERSUS-

RULING

1. The applicants in the consolidated judicial review applications are seeking orders of certiorari, prohibition, and mandamus in respect of tax demand notices issued against them by Kenya Revenue Authority (KRA). In brief, they allege that the demand notices were issued in contravention of the process laid down in the Value Added Tax Act which allows recipients of demand notices at least 30 days to pay taxes or lodge their objections. Further, that they were not given any hearing with regard to the claims and this contravened the Fair Administrative Actions Act and the Constitution.

2. This ruling relates to the 1st, 2nd and 3rd respondents' Notice of Motion application dated 11th January, 2019 brought under Order 51, Order 1 Rule 10 (2), Order 16 Rule 1 of the Civil Procedure Rules, 2010; Sections 3 and 3A of the Civil Procedure Act; and all other enabling provisions of the law. The application is seeking the following orders:-

- i. THAT the “missing traders” annexed herein in schedule 1 be summoned to court for cross-examination.**
- ii. THAT the “missing traders” annexed herein in schedule 1 be enjoined as interested parties in this matter.**
- iii. THAT the respondents be granted leave to call 4 four expert witnesses annexed herein in schedule 2.**
- iv. THAT the costs of this application be provided for.**

3. To avoid confusion I will continue referring to the applicants in the instant application as the respondents. The respondents in the application shall be referred to as the ex-parte applicants or the proposed interested parties depending on their status in these judicial review proceedings. The application is grounded on the supporting affidavit of Mr. Weldon Ngeno sworn on 14th January, 2019. According to the deponent, the respondents had received information of a network conducting trade dealings in the form of huge sales, with little or no taxable income. The said dealings were being conducted by traders referred to as “missing traders” as their business premises as declared in iTax could not be located and any efforts to trace them including through their declared mobile phones were unsuccessful.

4. Upon investigation by the respondents, it was established that there was a scheme of several traders including the “missing traders” in which they were milling and selling fictitious invoices at a commission to their beneficiaries who are the applicants in these judicial review applications. The beneficiaries would then claim input VAT from the non-existent sales in order to reduce their tax liability.

5. It is the respondents' averment that the “missing traders” must be summoned so as to determine whether the documents (the allegedly fictitious invoices) they issued are genuine before they can be produced as evidence.

6. On the need to call expert witnesses, the respondents averred that expert witnesses are necessary to demonstrate that the respondents have discovered a fraudulent scheme between the applicants and “missing traders” which has cost the taxpayers billions of shillings. According to the respondents, the witnesses will demonstrate in detail the way in which the scheme operated not only to register two businesses in one person's name and trade using their individual pin; but they will also prove that the names of the proprietors of the businesses are different from those registered in iTax as partners and that the same businesses have never been registered. Further, that the expert witnesses will also prove that the missing traders' bank statements reveal that the deposits made were less than the sales declared for VAT by the traders which amounted to billions of shillings.

7. The application was vehemently opposed. The 20th Proposed Interested Party filed a replying affidavit sworn on 15th October, 2018 by Mr. Mohammed Hussein Ali who is the Chief Executive Officer of the company. He avers that the company is already involved in litigation over the same issues with the 1st Respondent in **Nairobi High Court Constitutional Petition No. 167 of 2019 Top Models and 44 others v Kenya Revenue Authority** where the 20th proposed Interested Party is the 6th Petitioner.

8. Mr. Ali contends that by virtue of the fact that the company and the 1st Respondent are engaged in litigation over similar issues, the company cannot be a witness for the 1st Respondent in this matter as that would amount to a conflict of interest. Further, that the company cannot be compelled to testify. Additionally, it is deposed that the respondents cannot join a party to proceedings with the aim of compelling them to testify; and that it would be in the interests of justice and would safeguard the proceedings in **Nairobi High Court Constitutional Petition No. 167 of 2019 Top Models and 44 others v Kenya Revenue Authority** if the company is not enjoined in the proceedings.

9. The 2nd to 5th and 8th to 23rd ex-parte applicants filed grounds of opposition dated 8th March, 2019 in response to the application in which they urge the court to dismiss the application.

10. The ex-parte applicants oppose the respondents' application on the ground that the orders sought for joinder of the missing traders for purposes of cross-examination cannot issue as the respondents failed to effect service upon the proposed interested parties.

11. Additionally, it is claimed that because these proceedings are judicial review proceedings, which by their nature challenge the administrative decision-making process rather than the merits, the application is frivolous and vexatious as it improperly transforms judicial review proceedings into an avenue for merit-oriented consideration of issues which happens in ordinary civil litigation.

12. The ex-parte applicants further claim that the judicial review court has no jurisdiction to conduct a review of the merits and facts which should be done by the High Court in its ordinary civil jurisdiction.

13. The ex-parte applicants also contend that it would offend the procedure in sections 8 and 9 of the Law Reform Act if the court was to grant orders for cross-examination or admit *viva voce* testimony.
14. According to the ex-parte applicants, none of the grounds for judicial review would be affected by calling the witnesses or experts since their evidence will not change the undisputed fact that the respondents denied any hearing to the ex-parte applicants before the tax demands.
15. It is also averred that the annexures to the application only relate to third party companies, and the respondents have failed to show a direct link between the annexed documents and the ex-parte applicants in order to justify the joinder or calling of witnesses.
16. It is the ex-parte applicants' position that the application is an attempt to delay the proceedings contrary to Section 8 of the Fair Administrative Action Act. Further, that in the annexed report marked KRA-1 the respondents admit to the lack of sufficient evidence to support the allegations of fraud as no fraud is alleged anywhere in the report against the ex-parte applicants and there is no proof of any sum of money being lost as a result of the fraud.
17. The respondents filed submissions dated 27th August, 2019. The first issue identified by the respondents is whether the "missing traders" should be enjoined as interested parties to this suit. On this issue, the respondents submit that the missing traders are linked to the case as the applicants have averred in their affidavits that the traders were their suppliers. It is the respondents' case that since the invoices which were issued to the ex-applicants by the proposed interested parties are of a questionable nature it is essential that they are summoned to substantiate how they came to issue the impugned invoices. It is therefore the respondents' case that the proposed interested parties are essential to the proceedings as the documents they made are in contention.
18. The second issue flagged by the respondents for the determination of the court is whether the "missing traders" should be cross-examined in these proceedings. The respondents admit that they are aware that judicial review proceedings are intended to examine the process of how a decision was arrived at, however, they submit that this is a unique case as it involves fraud. The respondents urge the court to allow cross-examination as the proposed interested parties are the only ones who can establish who the makers of the impugned invoices and ETR receipts are. On this point the respondent relies on the case of **The Law Society of Kenya v Faith Waigwa & 8 others [2015] eKLR** in which the court allowed cross-examination in an interim application.
19. The final issue submitted upon by the respondents is whether the respondents should call expert witnesses in judicial review proceedings. On this issue the respondents submit that there are instances in judicial review where an applicant can be allowed to call expert witnesses for example where the case is of a technical nature. It is their case that due to the complex nature of the missing trader scheme, it is necessary that they be allowed to call expert witnesses to explain the nature of the scheme to the court. They rely on the case of **R (on the application of Lynch) v General Dental Council [2004] 1 All ER 1159** where the claimant applied for judicial review and sought to call expert witnesses.
20. The 2nd to 5th and 8th to 23rd ex-parte applicants filed submissions dated 30th September, 2019. In their submission, the ex-parte applicants claim that the respondents are attempting to delay the proceedings by introducing factual matters and seeking cross-examination of witnesses which orders cannot be issued in judicial review proceedings. They contend that judicial review does not interrogate facts like ordinary civil claims and that all matters in judicial review proceedings are pleaded and proved by affidavit evidence.
21. It is the ex-parte applicants' submission that the respondents cannot seek to enjoin the missing traders as they have not been served personally and the traders are also not before the court. The ex-parte applicants' position is that allowing the application will amount to enjoining strangers to the proceedings before the court, and the application can only be perceived as a delaying tactic as parties not before the court cannot be cross-examined.
22. The ex-parte applicants further claim that the application for expert witnesses to testify is another delaying tactic as the Kenya Revenue Authority (KRA) has delayed in having the experts, who are its employees, file affidavits. It is further claimed that it is established law that in judicial review proceedings proof of facts is by way of affidavit evidence and there is therefore no room for oral cross-examination, even if the witnesses are experts. Further, that the court cannot evaluate the significance of the evidence of the experts without first seeing their affidavits.
23. It is additionally claimed that the respondents have no legal right of further response after the pleadings were closed and final submissions filed and exchanged.
24. The ex-parte applicants rely on the case of **R v Principal Secretary, Ministry of Transport, Housing and Urban Development ex p. Soweto Residents Forum CBO [2019] eKLR** to support their assertion that fair hearing and natural justice applies to all decisions including tax decisions and KRA failed to abide by those principles when they made a unilateral decision against them and rushed to enforce the said decision without following the proper procedure.
25. The case of **R v Office of the Director of Public Prosecution & 7 others ex-parte Sylvia Wairimu Njuguna [2018] eKLR** is cited to support the ex-parte applicants' assertion that the respondents have not met the threshold for joinder as they have failed to show that the "missing traders" should be enjoined, or the interest to be served by the joinder of the proposed interested parties.
26. The case of **Sanghani Investment Ltd v Officer in Charge Nairobi Remand & Allocation Prison [2007] eKLR** is referred to in support of the ex-parte applicants' averment that oral cross-examination of witnesses cannot take place in judicial review proceedings. The ex-parte applicants proffer that oral evidence and cross-examination is reserved for civil courts. Further, that the proposed witnesses and missing traders are witnesses of fact and a judicial review court would be stepping out of its mandate by permitting *viva voce* testimony. Reliance is placed on the decisions in the cases of **Simon Nganga Mbugua v The Returning Officer Kamukunji Constituency & another [2008] eKLR** and **R v Receiver Manager, Imperial Bank Limited (in receivership) ex parte Kaushik Natwarlal Thakkar [2017] eKLR** in support of the proposition.

27. The ex-parte applicants relying on the decision in **R v Attorney General & 3 others ex p. Ndengei Nguli [2016] eKLR** submit that in order to establish fraud there must be oral evidence produced to that effect. However, the production of oral evidence cannot be done in the judicial review process. Further reliance is placed on the case of **Bishop Zakaria Kahuth & another (suing as the Registered Trustees for the German Speaking Evangelical Lutheran Congregation in Kenya v County Government of Naitori & another [2017] eKLR**.

28. Having considered the pleadings and the submissions in respect of the application, I find that the issues for determination are:-

- a. Whether the court should allow the taking of *viva voce* testimony of the proposed interested parties and or the cross-examination of the respondents' expert witnesses; and
- b. Whether the proposed interested parties should be made parties to these proceedings.

29. The respondents have conceded that they are indeed aware that the judicial review process is intended to scrutinise the process of how a decision was arrived at. They, however, contend that these being matters dealing with fraud, the circumstances are unique. They urge the court to allow the cross-examination of the proposed interested parties as they are the only ones who can determine who made the impugned invoices and ETR receipts. The respondents further submit that there are instances in judicial review proceedings where a party can be allowed to call expert witnesses especially where the case is technical in nature.

30. On the other hand, the ex-parte applicants contend that the respondents' application is an attempt to introduce factual matters into the judicial review proceedings rather than raising the said matters in civil or criminal proceedings.

31. At the outset, it must be stated that judicial review proceedings are only concerned with the process by which an administrative decision or action is made. In the matter before me the ex-parte applicants have complained that they were not afforded an opportunity to be heard before they were issued with tax demand notices by KRA. These are indeed complaints that fit into the judicial review docket. What the respondents are required to do is to establish that all proper procedures were followed and the impugned decision was not illegal, unfair or irrational. As such, any evidence to be adduced by the public body accused of procedural impropriety must be towards the goal of proving that there was fair administrative action, and should not be an attempt to establish whether the decision was based on accurate information or evidence.

32. I find support in the case of **Republic v Divisional Criminal Investigation Officer (DCIO), Langata & 2 others; Cyril Global Investment Limited & 3 others (Interested Parties) Ex-parte Coast Price Motor Limited [2019] eKLR** where the Court held that:-

“It is an established position that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue, which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation.

Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.”

33. In the same case, the Court refers to the decision in **Republic v District Land Registrar, Mombasa & 5 others ex-parte Nova Properties Limited [2016] eKLR** for the holding that:-

“24. [...] judicial review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

34. Further reference is made to the case of **Republic v National Transport & Safety Authority & 10 others Ex-parte James Mugo [2015] eKLR** in which the Court held that:-

“24. [...] Where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”

35. It was further decided in **Republic v Divisional Criminal Investigation Officer (DCIO), Langata & 2 others; Cyril Global Investment Limited & 3 others (Interested Parties) Ex-parte Coast Price Motor Limited [2019] eKLR** that where there exist allegations of fraud the same cannot be adjudicated on in judicial review proceedings. According to the Court:-

“25. [...] It is an established position of law that allegations of fraud must not only be specifically pleaded, but must be proved. Such a high standard of proof cannot be achieved by making averments in an affidavit as has happened in this case especially where the other party disputes the allegations.”

36. In *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another* [2014] eKLR it was held that:-

“11. [...] That determination necessarily requires that oral and/or documentary evidence be adduced more so the evidence of the surveyors. In the absence of such evidence, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising judicial review jurisdiction under sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. Where the determination of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law.

[...] In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making the said declarations. Here, not only are there factual disagreements, which require to be resolved and which go beyond the Court’s jurisdiction in judicial review proceedings, but there is insufficient material upon which the applicant’s case can be sustained.”

37. It is evident that the respondents wish to call upon the expert witnesses to establish the legitimacy of their claim that there was indeed a fraud scheme between the ex-parte applicants and “missing traders”, and the details of how the fraud was committed. Additionally, the purpose of summoning the “missing traders” is to establish the legitimacy of certain documents relied on by the respondents in making their administrative action. These are all issues of facts and do not concern the process of decision-making which is the purpose of judicial review.

38. I am therefore inclined to concur with the ex-parte applicants that this is not a proper case for allowing the respondents’ expert witnesses to testify. The issues raised by the ex-parte applicants in their applications for judicial review orders are matters that can be addressed without adduction of oral evidence. It is not that oral evidence cannot be adduced in judicial review matters. Where the court finds, and this is on very rare occasions, that *viva voce* evidence is necessary for achieving justice, it can allow for witnesses to be cross-examined.

39. Writing at pages 559-560 in the 10th Edition of their book titled “*Administrative Law*”, H.W.R. Wade & C.F. Forsyth state that:-

“Cross-examination was also rarely allowed under Order 53. On the whole judicial review is not concerned with factual disputes and is ill suited to resolve such disputes. But factual disputes can arise – for instance, over the existence of a jurisdictional fact or truthfulness of a particular witness – and then justice requires that cross-examination be ordered. CPR 54, however, apparently through inadvertent error, removes any express power to cross-examine in claims for judicial review. But the Administrative Court has held that, nonetheless, it retains the power to order cross-examination under CPR 32.1 (power to control evidence). Moreover, in some human rights context cross-examination may prove necessary more frequently. As an alternative, Collins J has suggested that where a factual dispute arises the court may consider ordering that the application for judicial review proceeds ‘as if a writ action. This will enable full discovery in the normal way and the hearing of witnesses’, i.e. cross-examination.”

[Citations omitted]

40. Sir Michael Supperstone, James Goudie QC and Sir Paul Walker at page 33 paragraph 3.4.8 of the 4th Edition of their book “*Judicial Review*” hold the same opinion. They state that:-

“Much of the court’s ability to uncover the fault in the process depends on both the court’s power to order disclosure of documents and for it to test the statements by Ministers and government officials. We still await the full application of what Lord Diplock said in *O’Reilly v Mackman*, to the effect that the court’s leave for disclosure and cross-examination in judicial review cases is governed by the same principles as in actions begun by writ or originating summons – namely, that ‘it should be allowed whenever the justice of the particular case so requires’. Practice reveals that the courts are hesitant about liberally implementing a power to examine documents, disclosable on the grounds of relevance, which is the test in an ordinary claim. ‘Justice’ in this context appears to have a limiting function. But it may not continue to be so limited. Experience has shown that skillful draughtsmanship of statements by those acting for government departments may not always protect the Executive from judicial scrutiny.”

[Citations omitted]

41. I do not understand how the respondents’ expert witnesses can communicate through oral testimony what they cannot comprehensively state through affidavits. In my view, an expert witness who cannot explain himself or herself in writing is not likely to proffer any useful evidence orally. In any case, what is before this court is not the question of the “missing traders” but the issue as to whether the ex-parte applicants were taken through a fair administrative process by the respondents.

42. The other issue is whether the respondents’ application for joinder of the “missing traders” as interested parties should be allowed. The respondents contend that the “missing traders” are linked to the case and therefore can be joined to the proceedings by virtue of the fact that they were the suppliers of the ex-parte applicants. According to the respondents the “missing traders” must therefore be summoned before the court in order to establish how the impugned invoices were issued to the applicants.

43. The ex-parte applicants contend that the “missing traders” cannot be joined as they have not been served personally and are not before the

court.

44. I must begin my determination by stating that joinder of parties is permitted in accordance with Order 1 of the Civil Procedure Rules, 2010. Furthermore, in the case of **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR** the Court posited that joinder of all parties who have a right to relief should be permitted at any stage of the proceedings with the aim of avoiding a multiplicity of suits. The Court, however, noted that joinder will not be allowed where:-

“[2] [...] such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit.”

45. The case cited above deals with joinder in ordinary civil cases, but because this is a judicial review matter, the law governing joinder in such matters ought to be considered. In the case of **Republic v Salaries and Remuneration Commission Ex-parte Parliamentary Service Commission & 4 others [2018] eKLR** the Court in considering the procedure for joinder of parties to judicial review proceedings relied on the Court of Appeal decision in **West Kenya Sugar Company Limited v Kenya Sugar Board & another [2014] eKLR** where it was held as follows:-

“[18]. In the absence of rules regulating the procedure, a person who is not a party to the judicial review application and who intends to oppose the application can approach the court in any manner of approaching the court permitted by the law. He can file an affidavit giving reasons why he considers himself to be a proper person and the grounds on which he intends to oppose the application. In the absence of rules, leave of the court to file such affidavit is not required. Further, a requirement for leave would mean that an application for leave has to be heard and determined before the hearing of the application, which may result in unnecessarily protracted proceedings. The affidavit should be served on all parties in good time before the hearing of judicial review application.”

46. In **Republic v Retirement Benefits Appeal Tribunal & 952 others Ex-parte Board of Trustees Teleposta Pension Scheme [2018] eKLR** the Court held that:-

“Therefore, in judicial review proceedings, while the Court has discretion as to who can be served with pleadings in a judicial review application, my understanding of the law is that for a person has been so served to be further joined as a party to the proceedings, he or she must by way of formal application demonstrate how they will be directly affected by the proceedings.

[...] this Court as a judicial review Court will not pronounce itself on any substantive rights or merits of any of the parties' respective cases, as its mandate is limited to the processes applied in reaching the impugned decision. It is therefore difficult to fathom how the Court in this proceedings is going to protect the Intended Interested Parties rights...”

47. It must, be noted that where the joinder of an interested party is being sought it must be proven that the party has an identifiable stake or legal interest or duty in the proceedings before the court. This is the definition of an interested party in Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

48. The respondents in this case have applied for the “*missing traders*” to be joined in these proceedings as interested parties in order for them to provide testimony as to who authored the impugned invoices. What the respondents are trying to do is to use these proceedings to carry out investigations on the “*missing traders*” saga. The application is diversionary. It seeks to delve into the merits of the matter thus defeating the purpose of judicial review, which is meant to expeditiously address complaints of maladministration. The impression one gets from the application is that the respondents are not sure of their claim in respect of the “*missing traders*” story. Indeed, the respondents have not demonstrated that the proposed interested parties have an identifiable stake or legal interest in the case. If the proposed interested parties had any stake in the outcome of this case, they would have brought themselves forward and sought to be enjoyed as interested parties. It is also important to note that, as correctly submitted by the ex-parte applicants, the proposed interested parties were not served with the application for joinder. It is not the duty of the respondents to determine that the proposed interested parties have an interest in the outcome of the matter. It is only the proposed interested parties who can tell the court the interest, if any, they have in the petition.

49. In conclusion, I find that although this court has powers to allow for cross-examination of witnesses in judicial review proceedings, the respondents have not demonstrated that it would be in the interests of justice to allow *viva voce* evidence in this case.

50. It is also my finding that the respondents have not established a case for the joinder of the proposed interested parties to these proceedings. In short, the respondents' application dated 11th January, 2019 is without merit in its entirety. It is therefore dismissed. Costs shall abide the outcome of the substantive notice of motion.

Dated, signed and delivered at Nairobi this 9th day of March, 2019.

W. Korir,

Judge of the High Court