



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL, JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO. 59 OF 2013**

IN THE MATTER OF:      ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF:      THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT

AND

IN THE MATTER OF:      AN APPLICATION BY KRISH COMMODITIES LIMITED FOR LEAVE  
TO APPLY FOR ORDERS OF JUDICIAL REVIEW AGAINST THE DECISION BY KENYA  
REVENUE AUTHORITY DEMANDING KSHS.26,215,578.00 ON ACCOUNT OF DUTY  
ALLEGEDLY UNDERPAID AND ISSUING AN AGENCY NOTICE THEREFOR.

**RULING**

1. This Ruling relates to the verbal application by counsel for **KRISH COMMODITIES LIMITED** (the ex-parte applicant) to cross-examine one, **Franklin Onjala Ombaka**, the Assistant Commissioner with the Respondent, the Kenya Revenue Authority (KRA), with regard to the said Assistant Commissioner's Replying Affidavit sworn on 6<sup>th</sup> in December 2013 and filed on 9<sup>th</sup> December 2013, on the alleged inconsistency in the duty declared on the on-line importation of the commodities, and those subsequently demanded by the Respondent after payment of the customs duty declared on-line.
2. Counsel acknowledged that Judicial Review is a jurisdiction which is *sui generis* as it has often been stated in many decisions of the Court of Appeal as well as the High Court. Mr. Khagram, learned counsel for the Applicant in this application offered, and did submit a few authorities which suggest that though cross-examination in Judicial Review is rare, it may be granted in exceptional circumstances. Counsel relied on the *dicta* expressed in several decisions to this effect. I will now refer to those cases.
3. The first case cited by counsel was **REPUBLIC vs. THE CONSTITUENCY DEVELOPMENT FUND BOARD AND ANOTHER ex-parte ROBERT II TARUMATWA KOCHALE**[ 2011] e KLR where W.K. KORIR J referred to the decision of a three judge bench in Miscellaneous Application Number 128 of 2003(**KENYA AFRICAN NATIONAL UNION (K.A.N.U.) vs. THE PRESIDENT OF THE REPUBLIC OF KENYA, HIS EXCELLENCY HON. MWAI KIBAKI AND SIX OTHERS**, where that court cited **William Wad AND Christopher Forsyth Administrative Law, 9 Edition Page 648** where those authors said –

*“a feature of prerogative remedy procedure which remains unaltered is that evidence is*

*taken on affidavit, i.e. sworn statement in writing rather than orally. It is possible but exceptional for the court to allow cross-examination on the affidavit.”*

4. In the earlier case of **KIBAKI VS MOI & ANOTHER ELECTION PETITION NUMBER 1 OF 1998** the High Court dismissed an application for cross-examination of the deponent saying:

*“In exercise of its ordinary jurisdiction, the High Court is vested with discretionary power to allow the cross-examination for a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed cross-examination will not be allowed.”*

5. The court came to a similar conclusion in the Case of **IRISH BANK RESOLUTION CORPORATION LIMITED vs QUINN [2012] IEHC 510** where Kelly J said –

*“I am satisfied that there is jurisdiction to make the order sought. In my view, the discretion of the court ought to be exercised in favour of the order sought. I am of the opinion that the plaintiffs have demonstrated sufficient grounds for making of such a reference to the material contained in the respondents disclosure affidavits when examined in light of the complaints made in the Affidavit of the Mr. Woodhouse. I am also satisfied that the cross-examination is necessary to fill the vacuum...”*

6. In arriving at the above conclusion the court was following the earlier decision of O’Donovan J in **DIRECTOR OF CORPORATE ENFORCEMENT vs SEYMOUR[2000], EHC 369** in which the said judge said-

*“In my view, it is axiomatic that, when in the course of the applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavits sworn in those proceedings that there are material conflicts of facts between the deponents in these affidavits, the court must, if requested do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross-examined on his or her affidavit. This so because it is impossible for a judge to resolve a material conflict of fact disclosed in the affidavits. However while it seems to me that where it is debatable as to whether or not the cross-examination of a deponent on his or her affidavit is either necessary or desirable, the court should bend towards permitting of cross- examination. At the end of the day it is within the discretion of the court as to whether or not such cross-examination should be directed and that such discretion should only be exercisable in favour of such cross-examination, if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine.”*

7. In England, under Rule 54.16.6 of the Civil Procedure Rules 1998, the principles under which fresh evidence may be admitted in Judicial Review proceedings are:-

- (1) the court can receive evidence to show what material was before the inferior court, tribunal or public body,*
- (2) Where the jurisdiction of the inferior court tribunal or public body depends upon a question of fact or where the question of jurisdictional fact or procedural error, or*
- (3) where the decision making process is tainted by misconduct on the part of a member of the inferior court, tribunal or public body or one of the parties before such a body, from evidence is available to prove the particular misconduct alleged.*
- (4) where a party deliberately suppressed materials with the intention of misleading, it would be for the court to consider whether the conduct of the party would be decided as fraudulent so as to permit fresh evidence.*

8. None of these allegations were made by the Applicant's counsel. In this regard therefore, I would respectfully adopt the view expressed by **W.K. KORIR J IN REPUBLIC vs CONSTITUENCY DEVELOPMENT FUND BOARD** (supra) –

*“I believe that the court can invoke its inherent jurisdiction and order for cross-examination where it has been established that there is need to cross-examine a deponent on the contents of an affidavit. I however believe that the position in England is the correct position so that allowing applications for cross-examination should be done sparingly. The logic behind this policy is that judicial review proceedings are meant to be a fast and quick procedure to determine challenges encountered by citizens in their interaction with governmental and other authorities in administration action. Allowing cross-examinations would therefore lead to unnecessary delays. In any event judicial review proceedings are ideally meant to proceed on undisputed facts.”*

9. In this case, the material affidavit which counsel seeks to clarify by way of cross-examination of the Assistant Commissioner is the customs tax rate of 75% per metric ton, of long-grain rice imported from Vietnam as opposed to the 35% rate charged to the *ex-parte* Applicant, as if the rice was imported from Pakistan, the most important and largest buyer of Kenyan tea. That difference is well explained by the Assistant Commissioner in his Replying Affidavit and I am not persuaded of what else would be gained by permitting his cross-examination, other than prolongation of the determination of this and similar applications pending in this court.

10. In this application and similar applications, the undisputed facts are clear. The *ex-parte* Applicant imported long-grain rice from Vietnam. It was charged customs duty at a rate applied to Pakistan, which being the largest consumer of Kenyan tea, its agricultural products imported into Kenya enjoy a most favoured nation rate of taxation.

11. The question which the Judicial Review Court will ultimately have to determine is whether the demand for payment of additional duty is lawful. That will be a question of law, not fact. The cross examination of the **FRANKLIN ONJALA OMBAKA** or any other deponent on similar question will not aid in the determination of that question.

12. For those reasons, I decline to grant the application for cross-examination of the deponent.

13. This Ruling and the Orders shall *mutatis mutandis* apply to:-

1. **Miscellaneous Application Number 11 of 2013 Republic Vs K.R.A *ex-parte* Mshalle Commodities Limited.**
2. **Miscellaneous Application Number 12 of 2013 Republic vs K.R.A *ex-parte* Hussaba Trading Company Limited.**
3. **Miscellaneous Application Number 13 of 2013 Republic vs K.R.A. *ex-parte* Bandari Commodities Limited.**

14. There shall be orders accordingly.

**Delivered, dated and signed at Mombasa this 11<sup>th</sup> Day of March, 2015.**

**M.J. ANYARA EMUKULE**

**JUDGE**