



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 236 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258, AND 259(1) THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION ARTICLES 27(1), 36(1) AND 41(2)(C) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 27, 36, 41, 47, 48, 50(1), 73, 75, 129, 153(4)(a), 232 AND 259(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ONGOING PROCESS BY THE BOARD OF THE KENYA PIPELINE COMPANY LIMITED TO RECRUIT AND APPOINT THE STATE CORPORATION'S NEW MANAGING DIRECTOR**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ETHNIC COMPOSITION OF THE BOARD OF THE KENYA PIPELINE COMPANY LIMITED**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

***BETWEEN***

**OKIYA OMTATAH OKOITI.....PETITIONER**

***VERSUS***

**THE BOARD, KENYA PIPELINE COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY,**

**PETROLEUM AND MINING.....2<sup>ND</sup> RESPONDENT**

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

**AND**

**JOHN NGUMI (CHAIRMAN).....1<sup>ST</sup> INTERESTED PARTY**

WAHOME GITONGA (BOARD MEMBER).....2<sup>ND</sup> INTERESTED PARTY

WINNIE MUKAMI (BOARD MEMBER).....3<sup>RD</sup> INTERESTED PARTY

IITASAYON NEEPE (BOARD MEMBER).....4<sup>TH</sup> INTERESTED PARTY

SOPHIA SITATI (BOARD MEMBER).....5<sup>TH</sup> INTERESTED PARTY

RITA OKUTHE (BOARD MEMBER).....6<sup>TH</sup> INTERESTED PARTY

JINARO KIBET (BOARD MEMBER).....7<sup>TH</sup> INTERESTED PARTY

ANDREW KAMAU (PS, PETROLEUM  
AND MINING)..... 8<sup>TH</sup> INTERESTED PARTY

BRIAN MURIUKI (BOARD MEMBER  
ALTERNATE TO PS)..... 9<sup>TH</sup> INTERESTED PARTY

ERICK KORIR (BOARD MEMBER  
ALTERNATE TREASURY).....10<sup>TH</sup> INTERESTED PARTY

MACHARIA IRUNGU (NEWLY  
APPOINTED KPC MD).....11<sup>TH</sup> INTERESTED PARTY

#### RULING

Vide his Petition dated 6<sup>th</sup> December 2019 the Petitioner seeks the following remedies against the Respondents and Interested Parties –

- a) A Declaration be and is hereby issued that the composition of the KPC Board is irregular and unconstitutional to the extent that it has five members from one ethnic group.
- b) A Declaration be and is hereby issued that the Board’s failure to discharge its obligation to publish and publicize lists of applicants, lists of shortlisted candidates, and the time and venue of the scheduled interviews, the scoring by the interview panel, and the results of each candidate was fatal to the recruitment exercise.
- c) A Declaration be and is hereby issued that the Board’s failure in the advert for the vacancy to comply with Section 37(4)(d) and (e) of the Public Service Commission Act No. 10 of 2017 by providing the terms of employment and the applicable remuneration including salary, allowances and other benefits, was fatal to the recruitment exercise.
- d) A Declaration be and is hereby issued that the Board’s failure to discharge its obligation to provide for public participation in the impugned recruitment process for the Managing Director of the KPC was fatal to the exercise.
- e) A Declaration be and is hereby issued that the presence of both the substantive director and his alternate on the interview panel voided the entire exercise.
- f) A Declaration be and is hereby issued that the impugned recruitment process for the position of the KPC Managing Director is unconstitutional and, therefore, invalid, null and void *ab initio*.
- g) The Court do issue and hereby issues an order quashing/disbanding the KPC Board.
- h) The Court do issue and hereby issues an order quashing the KPC Board’s impugned recruitment and appointment of Mr. Macharia Irungu as the Corporation’s new Managing Director.
- i) The Court do issue and hereby issues an order compelling the Cabinet Secretary to competitively recruit and appoint a new KPC Board strictly in accordance with the Constitution and legislation.
- j) The Court do issue and hereby issues an order compelling the new KPC Board to be appointed by the Cabinet Secretary to competitively recruit and appoint a new KPC Managing Director strictly in accordance with the Constitution and legislation.
- k) The Court be pleased to issue and hereby issues an order ordering the Respondents to jointly and severally bear the costs of this

Petition.

l) Consequent to the grant of the prayers above the Court be pleased to issue any other or further remedy (directions and orders) that the Court shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.

The petition was filed together with a motion in which the petitioner seeks the following orders –

1. That the application be certified as urgent and be heard ex parte and service thereof be dispensed with in the first instance.
2. That pending the inter-partes hearing and determination of this Application and/or the Petition herein the Court be pleased to grant an order suspending the appointment of MR. MACHARIA IRUNGU as the new Managing Director of the Kenya Pipeline Company (KPC) with effect from 2nd January 2020.
3. That pending the inter-partes hearing and determination of this Application and/or the Petition herein the Court be pleased to issue a temporary order of prohibition prohibiting the respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect to the appointment of MR. MACHARIA IRUNGU as the Managing Director of the Kenya Pipeline Company.
4. That pending the inter-partes hearing and determination of this Application and/or the Petition herein the Court be pleased to issue an interim order compelling the respondents to produce the scoring sheets showing how each member on the panel ranked candidates, the scores awarded to each candidate by each member of the committee, and the criteria used in selecting the three shortlisted candidates.
5. That consequent to the grant of the prayers above the Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.
6. That costs be in the cause.

Upon hearing the petitioner ex parte on 6<sup>th</sup> December 2019, the Duty Judge granted orders that status quo be maintained. The application came before me for inter partes hearing on 20<sup>th</sup> December 2019 when by the consent of parties the application and petition were consolidated and fixed for hearing on 16<sup>th</sup> January 2020. I extended the orders of status quo pending hearing of the petition and gave directions on filing of all necessary pleadings and written submissions. This was with a view to expediently dispose of the petition.

When the matter came up for hearing on 16<sup>th</sup> January 2020 the parties drew my attention to two applications which had been filed by the Petitioner. The first is dated 3<sup>rd</sup> January 2020 and seeks orders that the petitioner's amended petition of even date be admitted as having been amended, filed and served with the leave of the court.

The second application dated 9<sup>th</sup> January 2020 seeks orders that–

1. That this Court be pleased to certify this application as extremely urgent and hear it ex-parte at the first instance
2. That until and unless they purge the contempt, this Court be pleased to deny audience to the respondents and the 1<sup>st</sup> to 10<sup>th</sup> Interested Parties.
3. That this Court be pleased to cite the 1<sup>st</sup> to 10<sup>th</sup> Interested Parties for contempt of Court and consequently punish them according to the law.
4. That the costs of this application be provided for.

Respondents and Interested parties filed both replying affidavits and written submissions in response to all the pleadings filed by the petitioner.

The two applications were heard on 16<sup>th</sup> January 2020. It is these two later applications that are the subject of this ruling. Also for determination is whether the ex parte status quo orders should be vacated.

#### **Petitioner's case**

Mr. Omutata, the petitioner submitted that the application dated 9<sup>th</sup> January 2020 is an application for contempt. That this court issued orders which have been defied. He referred the court to the said orders annexed to the application at pages 1 and 3 and 10 to 11 thereof.

He submitted that the orders directed that status quo be maintained until 16<sup>th</sup> January 2020 when the application would be heard. That contrary to the orders, the Acting Managing Director had been prevented from accessing office and now the company is without a Managing Director. That this fact is not disputed and is confirmed in Mr. John Ngumi's affidavit dated 16<sup>th</sup> December 2019.

Mr. Omutata submitted that the details are in his 2<sup>nd</sup> supplementary affidavit filed on 16<sup>th</sup> January 2020. That from 2<sup>nd</sup> January 2020 the Acting Managing Director was not reporting on duty.

He submitted that this court gave the orders in the presence of the Advocates of the respondents and further clarified the orders to the effect that the exiting Acting Managing Director was to vacate office upon the assumption of office by the new substantive Managing Director. He submitted that the evidence is contained his affidavit filed on 16<sup>th</sup> January 2020 at page 1 of annexures.

Mr. Omutata submitted that in the affidavit of John Ngumi of 16<sup>th</sup> December 2019 at page 26, paragraph 11 confirms that the Acting Managing Director would have left office on Monday 2<sup>nd</sup> December 2019 because the new Managing Director was scheduled to assume office on that day, and that he removed his property in readiness to hand over but the Board asked him to stay on until 1<sup>st</sup> January 2020 when the new Managing Director was to take office. Mr. Omutata stressed that the Acting Managing Director was to leave office from the date the new Managing Director takes over. That the removal of Mr. Andambi from office is in contempt of the court order.

He referred to his written submissions dated 9<sup>th</sup> January 2020 filed on 13<sup>th</sup> January 2020 and the list of authorities and submitted that the same establish that there were valid court orders which the contemnors were aware about but defied. He prayed that they be punished under the laws of Kenya. That the repeal of the Contempt of Court Act does not invalidate the power of the court to punish for contempt until and unless the contempt is purged.

He submitted that his prayer number 2 is that the respondents be denied audience until they comply.

### **Submissions by the 1<sup>st</sup> Respondent and the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> to 11<sup>th</sup> Interested parties**

Senior Counsel Mr. Ngatia for the 1<sup>st</sup> Respondent and the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> to 11<sup>th</sup> Interested parties observed that the application filed on 9<sup>th</sup> December 2020 was served on his office on 14<sup>th</sup> January 2020. He stated that this explained the flurry of filing.

He submitted that the orders that are the subject of the application emanate from the application filed on 6<sup>th</sup> December 2012 wherein status quo orders were made suspending the appointment of Mr. Macharia Irungu as managing Director pending inter partes hearing, and from proceeding with giving effect to the appointment of Mr. Irungu.

He submitted that the two prayers before the court related to appointment of Irungu. None related to any other employee. None related to the bank signatories

He submitted that in the petition and in the application there is absolutely no averment that this case is for the benefit of any employee, acting or otherwise.

He submitted that in the replying affidavit filed on 16<sup>th</sup> December 2019, at page 24 is a memo unsolicited, from the Acting Managing Director who has at no time departed from this covenant.

That time on 5<sup>th</sup> December 2019, a day before this case was filed, there were rumours in social media that the Acting Managing Director had requested a Senator to castigate the Board. He said he was a candidate. He said if the rumours were true he would have appointed a lawyer.

At page 25 is an email. At paragraph 1 and 2 reads paragraph 2 – I have no complaint on appointment of Managing Director.

As at 5<sup>th</sup> December 2019 a Managing Director had been appointed and that appointment made public by the Minister. In his email the acting Managing Director accepts the results of the interview and states that there having been more than three candidates not all would be within the first 3.

At page 26, the acting Managing Director at paragraph 11 he states that “...is why I had last Sunday carried away what I believed belong to me, ready to hand over on 2<sup>nd</sup> December 2019.” That there was no prompting of the Board.

That he further says in the affidavit that “... when the Chairperson called me to inform me about the decision to stay on ... I had no option either to accept or decline ... the offer to continue in service.” He says he accepted the offer. At paragraph 12 he says “I must be very sincere I have no intention of staying beyond 1<sup>st</sup> January 2020. He says “*One can take it to the bank.*”

Senior Counsel Ngatia submitted that it has been trite law since a century or 2 back, that no state organ can compel a person to give his labour to an employer. He further submitted that in the affidavit of 8<sup>th</sup> January 2020 at page 8 there is a very important letter from PSC dated 3<sup>rd</sup> October 2019 which states that on 3<sup>rd</sup> October 2013, this the acting Managing Director was a civil servant in the Ministry of Petroleum from where he was seconded to the 1<sup>st</sup> Respondent. The letter states he is not eligible for extension of service since his contract ceased on 6<sup>th</sup> April 2019. That his continued employment lies with the Board of Directors. It is on the basis of this letter that the Board, out of magnanimity, extended the services.

SC Ngatia submitted that the contention that this appointment had a rider by the Minister, to the effect that it would subsist until a substantive holder of the office is appointed is not supported by the evidence. That the press release of 28<sup>th</sup> November 2019 confirms that the Cabinet Secretary is the one who appoints Cabinet Secretaries. That even if the earlier press release of 4<sup>th</sup> October 2019 is that the appointment of Mr. Andambi was to last until a substantive Managing Director is appointed, at page 17, the Cabinet Secretary commends the Board for the conduct of the interviews. It would be contrary to all these to say the Cabinet Secretary did not appoint.

On the issue whether his client had defied the court order, SC Ngatia submitted that it had not, but on the contrary, had complied. He submitted that a contemnor must be heard relying on the decision at page 10 of his authorities

At page 15 the principle is expanded by the Court of Appeal – that each person ought to be heard. At page 28 – at paragraph 73 the court states the court cannot injunct that which the law states must be done by a public authority.

The minute the Cabinet Secretary appointed the substantive Managing Director fortified by the Acting Managing Director stating he wished to relinquish office by the Acting Managing Director, if is not with the mandate of the petitioner to seek to extend the tenure of Acting Managing Director.

It is further the submission of senior Counsel Ngatia that the Petitioner has not demonstrated authority to file a proxy suit on behalf of Acting Managing Director who freely relinquished office by his letter he is full of gratitude to his employer.

He urged the court not to extend the status quo order.

### **Submissions by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and 8<sup>th</sup> Interested Party**

Ms. Akuno submitted that she would rely on her grounds of opposition filed on 16<sup>th</sup> January 2020 and adopt and rely on submissions by Mr. Ngatia, Senior Counsel.

She further submitted that the Acting Managing Director is not a subject of the application and suit before court and upon which the ex parte orders were issued. That orders to extend Acting Managing Director's term were neither prayed for nor granted and cannot be a subject of a contempt application.

In relation to signatory to bank account, she submitted that the same were also not subject to application or petition. She further pointed out that the purpose of the order was not to halt the operations of Kenya Pipeline Company (KPC).

She submitted that the intent of the instant application is to derail the court process and ensure the petitioner is enjoying the court orders to the detriment of the respondent.

She urged the court to dismiss the application with costs.

### **Petitioner's Rejoinder**

Mr. Omutata, in response to the Attorney General's submissions submitted that this application is not intended to delay court process. That this is why he filed the application together with submissions and authorities.

He submitted that extension of contract is not an issue and nobody is seeking extension of contract. That the respondent has not exhibited the contract. That they are hiding the terms of reference of the Acting Managing Director.

On prayers of notice of motion no. 2, 3 and 4, he submitted that they are aware to the fact that an appointment had been made but the office had not been handed over. That an appointment concludes with a person taking office. That the 11<sup>th</sup> Interested Party had not assumed office from the incumbent.

He submitted that the court orders were not intended to derail the KPC. That the orders of status quo were to preserve the proceedings based on the facts presented. That what was being preserved was the assumption of office and that is what the prayers seek. That Mr. Andambi had not handed over the office to anybody.

To respond to Senior Counsel Ngatia, Mr. Omutata submitted that

Mr. Andambi was an outsider appointed after the previous Managing Director was arrested for corruption. That the Ministry brought in Mr. Andambi because there was public interest to be protected by bringing him to protect the assets.

He submitted that the prayers need to be contextualised. That it was alleged Mr. Andambi is the one who went to Senator Ole Kina to contest the handing over to the 11<sup>th</sup> Interested Party.

He submitted that magnanimity of the Board is not demonstrated. The new appointee may well not have been ready to take over. The matter went on social media before the taking over which compelled me to inquire.

That Mr. Andambi was holding office of Managing Director. The order came after that memo that he did not wish to stay in office after 2<sup>nd</sup> January 2020 because he had been accused of going to social medial.

That the appointment of the new Managing Director was tainted with illegality and cannot be used.

Omtata submitted that there was been an allegation that the Board would wish to appoint an employee. When Mr. Andambi was appointed, those staff were in office.

### **Analysis and Determination**

I have considered the pleadings, submissions and authorities filed by the parties. The issues for determination are first, whether the Respondents and Interested parties are guilty of contempt and if so, whether they should be denied audience and be punished for the same. The second issue is whether the amended petition filed in court by the petitioner should be admitted and deemed to be properly on record. The final issue is extension of status quo orders.

### **Contempt Application**

The acts that the petitioner/applicant alleges to constitute contempt according to the application are that the chairman and members of the Board of the 1<sup>st</sup> Respondent have made changes to the office of the managing director contrary to the status quo orders of this court; secondly that they have removed Mr. Hudson Andambi who is Acting Managing Director from office and plan to replace him; thirdly that Mr. Andambi was appointed to be in office until a substantive MD assumes office.

The alleged contemnors on their part have pleaded that Mr. Andambi voluntarily left office and does not wish to go back. To confirm this, they have attached a Memo dated 5<sup>th</sup> December, 2019 from Mr. Andambi, in which at paragraph 12 therein he clearly states that he was ready to leave office on 2<sup>nd</sup> December 2019 when the new Managing Director was supposed to take over and he only up to 1<sup>st</sup> January 2020 stayed on because the Board asked him to do so.

It is on this basis that the Respondents submitted that they are not in contempt of the Court orders issued on 6<sup>th</sup> December 2019.

From the email of Mr. Andambi, it is evident that he freely relinquished office. The context however appears to be a reaction to what is perceived to be pressure from external sources, in this case social media, insinuating that he approached Senator Ole Kina of Narok County to scuttle the appointment of a substantive Managing Director for Kenya Pipeline Corporation. There is no indication that there was any pressure emanating internally from the Kenya Pipeline Company Limited.

To answer the question on whether or not the alleged contemnors should be cited for contempt this Court has considered the following questions:

- 1) Whether an Order for Status quo can be subject of contempt proceedings
- 2) What constitutes Contempt
- 3) Whether the alleged contemnors' acts or omissions (if any) are tantamount to contempt
- 4) Whether the Order for Status quo should be vacated.

### **Whether an Order for Status quo can be subject of contempt proceedings**

The answer to this question is in the affirmative. In the Court of Appeal decision in the case of *Kiru Tea Factory Vs Stephen Maina Githiga & 14 Others (2019) eKLR* the Court extensively discussed the issue on whether an order for status quo can be subject to contempt proceedings.

The Court in that matter found the alleged contemnors guilty of contempt for convening, presiding over and attending the AGM held on 14<sup>th</sup> December 2017 in complete violation and/or disregard to the status quo orders issued by the Court on 6<sup>th</sup> December, 2017.

Coming back to the instant application, there are Orders of status quo issued by this Court on 6<sup>th</sup> December, 2019, which order binds all parties in this petition unless and until such orders are vacated or varied. In essence the Order of status quo meant was the then acting Managing Director was to hold office until a substantive Managing Director is appointed and/or the Petition filed herein is heard and determined. The orders have not been vacated or varied and are binding.

### **What constitutes Contempt**

Black's Law Dictionary, 9<sup>th</sup> Edition at page 360 defines contempt as follows;

**“Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”**

Punishment of contempt is necessary for maintenance of law and Order and to uphold the dignity of the Courts. It is trite law that every person against whom a Court Order is made has unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside. See *Econet Wireless Kenya Ltd vs. Minister for information & Communication of Kenya & Another [2005] 1 KLR 828*.

In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

- a. The terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;

b. The Defendant had knowledge of or proper notice of the terms of the Order;

c. The Defendant has acted in breach of the terms of the Order;

and

d. The Defendant's conduct was deliberate.

Refer to the decision in **Trusted Society of Human Rights Alliance Vs Cabinet Secretary for Devolution and Planning & 3 Others (2017) eKLR**.

The question then that arises is whether the above elements are present in the instant suit.

On the first issue, the order of status quo is clear in itself and is binding. Second is the issue of knowledge of the order by the defence. I must comment that this has been subject to a lot of changes with growth of jurisprudence in the Country. In the recent jurisprudence the courts have posited that knowledge of a court order is sufficient to dispense with personal service for the purposes of contempt proceedings. Reference is made to the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** where it was held:-

*“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”*

This position has been affirmed in several other cases including the case of **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR**.

Third, is the issue whether the alleged contemnors have committed any act of contempt in respect of the status quo orders herein.

According to the petitioner, the Acting Managing Director who was in office has been prevented from accessing the office. He further submitted that there is no document terminating the appointment of Mr Andambi, who was to be in office until a substantive Managing Director take offices according to the instrument of his appointment. That had this court not stopped the 11<sup>th</sup> Interested Party from taking over the office, Mr. Andambi's contract would have expired on 2<sup>nd</sup> January 2020 when the 11<sup>th</sup> Interested Party took over the office as was expressed by the Cabinet Secretary in the press statement of 4<sup>th</sup> October 2019. That since this did not happen, Mr. Andambi should be in office until a substantive Managing Director takes office.

Mr. Omutata further submitted that Mr. Andambi only stated that he had no intention to stay in office beyond 1<sup>st</sup> January 2020 in response to accusations that he had instigated Senator Ole Kina to frustrate the appointment of the 11<sup>th</sup> Interested Party as Managing Director.

The respondents and Interested Parties have on the other hand argued that they have not removed Mr. Andambi from office, that Mr. Andambi having left of his own volition they cannot force him to stay in office against his will.

As was expressed in the **Econet Wireless** case (supra), a contemnor must have deliberately acted in breach of the terms of a court order to be found in breach. Mr. Omutata has not stated what acts the respondents and Interested Parties committed that constitute disobedience of the court order. His only evidence is that the respondents and Interested Parties have admitted that Mr. Andambi is not in office and that the reason is because of the false accusations against him.

I do not find any evidence of deliberate acts in disobedience of the court order. All the respondents and Interested Parties did was to accept Mr Andambi's statement that he was not interested in staying in office. What I understand Mr. Omutata to be saying is that the respondents and Interested Parties should have persuaded Mr. Andambi to remain in office following the status quo orders of the court. This would not amount to a deliberate act in disobedience of a court order. Even though I agree with Mr. Omutata that the context of Mr. Andambi's statement was in response to accusations that he was the one who caused Senator Ole Kina to make pronouncements against the appointment of the 11<sup>th</sup> Interested Party, I do not agree with him that there was any act of contempt.

For the foregoing reasons, I find the petitioner's application dated 3<sup>rd</sup> January 2020 seeking to cite the respondents and Interested Parties for contempt to be without merit with the result that the same is dismissed.

#### **Whether the status quo orders should be disturbed**

The status quo orders were made in respect of the petitioner's application dated 6<sup>th</sup> December 2019 filed with the petition. On 20<sup>th</sup> December 2019, the court extended those orders after the parties agreed to hear both the petition and the application on 16<sup>th</sup> January 2020. The hearing was however forestalled by the filing of the two applications under consideration which had to be disposed of before the petition can be heard.

As has been admitted by both parties, the status quo has changed. Mr. Andambi who was Acting Managing Director of Kenya Pipeline Company at the time the orders were made has since vacated office and because of the status quo orders, no other person could be appointed to the office with the result that it is now vacant. All the parties are in agreement that this is not a desirable situation as the vacancy of the office undermines the critical role played by the office in the operations of Kenya Pipeline Company.

The petitioner wants this court to order that Mr. Andambi returns to the office as Acting Managing Director pending the appointment of a

substantive Managing Director or until the determination of the petition herein. The respondent's and Interested Parties however want the 11<sup>th</sup> Interested Party to take office pending determination of this suit, arguing that Mr. Andambi left office voluntarily and cannot be forced back. I have already discussed the arguments of both parties above.

The reason for which the court ordered status quo have not been resolved. The status quo orders were to prevent the 11<sup>th</sup> Interested Party from taking office. Granting the orders sought by the respondents and Interested Parties would compromise the subject matter of the petition. Ordering the return of Mr. Andambi to the office as proposed by the petitioner would however be tantamount to this court descending into the arena of the boardroom and taking over the role of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. This too is not a desirable or valid course for the court to take.

For these reasons, and in order to address the situation currently obtaining at Kenya Pipeline Company vacate the status quo orders and in its place, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are hereby directed to appoint an acting Managing Director to take office pending the determination of the petition herein.

#### **Whether the petitioner's amended petition should be admitted on record.**

In the amended petition filed on 13<sup>th</sup> January 2020 and in which the petitioner by his application dated 3<sup>rd</sup> January 2020 seeks to be admitted as having been amended, filed and served with leave of the court. The petitioner seeks to convert all the Interested Parties to become the 6<sup>th</sup> – 16<sup>th</sup> respondents and to add the Public Service Commission and the State Corporation Advisory Committee as 4<sup>th</sup> and 5<sup>th</sup> respondents respectively.

The general rule is that amendment of pleadings should be readily allowed. There are however circumstances when leave will be denied. In the case of **Waithira Mbage –V- Hillcrest Investment Limited (2017) eKLR** the court stated –

*“19. It is trite that amendment to pleadings should be readily allowed. However where a party object to joinder, the reasons must be assessed on their merits. Where joinder ill lead to practical problems in addressing the issue(s) in dispute or will occasion unnecessary costs on the parties in the suit, joinder will be declined. Joinder will also be declined where there is no specific relief sought against the intended respondent and the determining factor in joinder of parties is that there is no common question of fact or law that arise between the existing and the intended parties as held in **Lucy Nungari Ngigi & 128 Others v National Bank of Kenya Limited & Another [2015] eKLR.**”*

Under the prayers in his application for amendment, the petitioner seeks to add the following prayers –

1. A declaration be and is hereby issued that the KPC Board is irregular and unconstitutional because both its Chairman and the independent members were handpicked and appointed to public office without being subjected to a transparent, competitive, inclusive and merit based recruitment process open to public participation.
2. A declaration be and is herein be issued that the Brian Muriuki is unqualified to be appointed as the Board Member Alternate to the PS Petroleum and Mining.

None of the new prayers are against the proposed 6<sup>th</sup> to 16<sup>th</sup> respondents (current 1<sup>st</sup> to 11<sup>th</sup> Interested Parties). With or without the proposed amendments, the Interested Parties can only be named in this petition as Interested Parties as they cannot be called upon to explain how they were appointed to become members of the Board. It is the appointing authority that can be called upon to do that.

There is a second problem. As pointed out by the Counsel for the Interested Parties, they have been collectively sued as the 1<sup>st</sup> respondent. The individual members of the Board cannot be sued in two different capacities in the same suit. Refer to the case of **Joseph Kobia Nguthari –V- Kiegoi Tea Factory Company Limited and 2 Others (2016) eKLR**, where the court held that –

*“... the greatest legal innovation of separate corporate legal entity which was formulated in the case of **SALOMON vs. SALOMON [1897] AC 78**, that:-*

*“The company is at law a different person and altogether*

*from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act”.*

*This long-standing legal principle is until today true and has been adopted in national legislation and a great number of judicial precedents within the common law tradition including Kenya. I only cite the case of **VICTOR MABACHI& ANOTHER vs. NURTURN BATES LTD, CIVIL APPEAL NO. 247 OF 2005 [2013] eKLR**, where the Court held that a company*

*“...as a body corporate, is a persona juridica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil”.*

Finally, there is likely to be embarrassment to the Interested Parties in defending themselves and also for the petitioner in addressing the

issues. This is because the petition as it is now filled has been premised on the fact that it is the appointment of the 11<sup>th</sup> Interested Party that is contested by the petitioner. He has already given one of the reasons for contesting the appointment of the 11<sup>th</sup> Interested Party being that the Board is tainted by unconstitutionality and illegality. Paragraph 13 of the petition reads–

*“The petitioner is aggrieved that the KPC Board is tainted with unconstitutionality and illegality to the extent that five out of its nine (9) members are from the Kikuyu tribe. This fact is a matter of public notoriety.”*

At paragraph 16, the petitioner prays for the disbanding of the board. The paragraph reads –

*“with the above in mind, the petitioner prays that this Honourable Court disbands the Board for being improperly constituted and quashes the appointment of Mr. Macharia Irungu as the new KPC Managing Director, for being unreasonable, irregular, unlawful and therefore unconstitutional, null and void.”*

I thus find that the amendments touching on the two issues are unnecessary.

The foregoing notwithstanding, all parties have already expressed and appreciate the reason why the petition must be disposed off expeditiously. It is not in the public interest to mix the petition on the appointment of the 11<sup>th</sup> Interested Party, which has not yet crystallised as he has not yet taken office, with the appointment of the Board Members who have been in office for some time. The mixing of the two will unnecessarily delay the resolution of the matter of the office of the Managing Director. The petitioner will be at liberty to file another petition to seek the disbanding of the Board if he wishes to so do.

**For these reasons, I decline to admit the amended petition as filed on record.**

**The result is that both applications filed by the petitioner dated 3<sup>rd</sup> and 9<sup>th</sup> January 2020 are dismissed.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**