



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.....1ST RESPONDENT

THE CABINET SECRETARY, PETROLEUM AND MINING.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

JOHN NGUMI (CHAIRMAN)..... 1ST INTERESTED PARTY

WAHOME GITONGA (BOARD MEMBER).....2ND INTERESTED PARTY

WINNIE MUKAMI (BOARD MEMBER).....	3 RD INTERESTED PARTY
IITASAYON NEEPE (BOARD MEMBER).....	4 TH INTERESTED PARTY
SOPHIA SITATI (BOARD MEMBER).....	5 TH INTERESTED PARTY
RITA OKUTHE (BOARD MEMBER).....	6 TH INTERESTED PARTY
JINARO KIBET (BOARD MEMBER).....	7 TH INTERESTED PARTY
ANDREW KAMAU (PS, PETROLEUM AND MINING).....	8 TH INTERESTED PARTY
BRIAN MURIUKI (BOARD MEMBER ALTERNATE TO PS)	9 TH INTERESTED PARTY
ERICK KORIR (BOARD MEMBER ALTERNATE TREASURY)	10 TH INTERESTED PARTY
MACHARIA IRUNGU (NEWLY APPOINTED KPC MD)	11 TH INTERESTED PARTY

JUDGMENT

Before me for determination is the petition herein which is dated and filed on 6th December 2019. The petitioner describes himself in the petition as a resident of Nairobi City County, a law abiding citizen in Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, economic development, and prosperity.

The 1st Respondent - The Board, Kenya Pipeline Company Limited - is responsible for the Kenya Pipeline Company Limited, which is a 100% owned State Corporation established under the Companies Act (Cap 486). The Corporation is subject to the Constitution of Kenya, 2010; the State Corporations Act (Cap 446); and other relevant statutory and regulatory laws of Kenya. The Board has been sued herein for being improperly constituted to the extent that five out of its nine members belong to one tribe. The composition of the Board is a matter of public notoriety. The Board has also been sued for conducting the recruitment of the new Corporation's Managing Director in contravention of express provisions of the Constitution and legislation.

The 2nd Respondent – The Cabinet Secretary, Petroleum and Mining – is a State Officer in charge of the State Department responsible for the Kenya Pipeline Company Limited. Section 6(1)(e) of the State Corporations Act vests the power to appoint members of the Board in the Cabinet Secretary. Section 5(3) of the Act empowers the Cabinet Secretary to appoint the Managing Director of the Corporation on the recommendation of the Board. The ((institution and the Public Service Commission Act spell out how public office should be filled. The Cabinet Secretary has been sued for constituting a Board that does not have the face of Kenya, and as the party who is supposed to appoint the new Managing Director at the end of the impugned recruitment process.

The 3rd Respondent – The Hon. Attorney General - has been sued in this Petition as the legal adviser and representative of the Government of Kenya; a promoter and protector of the rule of law; and a defender of the public interest within the meaning of Article 156 of the Constitution.

The 1st to 10th Interested Parties are members of the Board of the 1st respondent while the 11th Interested Party is the newly appointed Managing Director of the 1st respondent.

The petitioner avers that the KPC Board is tainted with unconstitutionality and illegality to the extent that five out of its nine (9) members are from one tribe.

The petitioner avers that the recruitment of the 11th Interested Party which was carried out by the Board to fill the vacant position of the Managing Director of the Kenya Pipeline Company (hereinafter, “the KPC”) was conducted in contemptuous violation of the provisions of the Constitution and national legislation.

The petitioner posits that the impugned recruitment process was tainted with violations of the law, including the Constitution and it must be called out and be quashed by this Court.

The petitioner wants this Court to disband the Board for being improperly constituted, and to quash the appointment of Mr. Macharia Irungu as the new KPC Managing Director, for being unreasonable, irregular, unlawful and, therefore, unconstitutional, null and void.

The petitioner avers in the petition that on 19th July 2019 the KPC Board of Directors invited suitably qualified candidates to apply for the post of Managing Director. The deadline for applications was 5.00 pm on 2nd August 2019. That no list of applicants in the first advert was published. That in the Re-advertisement for the job, which closed at 5.00 pm EAT on Monday, 14th October 2019, the 1st respondent claimed that “*On scrutiny of the applications, the Board did not find an adequate number of qualified applicants to proceed to the next stage of interviews.*” The petitioner posits that this claim was contradicted by the call in the second advert that, “*All those who had applied earlier need to re-apply.*”

The petitioner posits that if it was true that applicants to the first advert were not qualified, why ask them to engage in an exercise in futility by reapplying for the job whereas the Board had established they were not qualified for, instead of notifying them that they were incompetent and should not apply?

That if no candidate in the previous recruitment exercise actually met the mandatory criterion set by the 1st Respondent, it was weird that the 1st respondent's considered opinion was that the said individuals were still eligible to apply for the job in the repeat recruitment process. Any reasonable and competent employer finding itself in such a predicament would re-advertise the position with an explicit proviso that previous unsuccessful candidates would not be eligible to apply.

That the failure to disclose the outcome of the first advert went against Article 35(3) of the Constitution on the right to access information as read together with Section 5 of the Access to Information Act, 2016.

That the second advert was irregular and unlawful since the applicants of the first advert did not know what happened to their applications.

The petitioner avers that contrary to Article 73 of the Constitution, the decision to cancel the first recruitment process was influenced by nepotism, favouritism, and/or other improper motives or corrupt practices, to the extent that the earlier recruitment exercise was abandoned not because it was not responsive but because a preferred candidate did not meet the minimum requirements.

The petitioner avers that, even for the second advert, no lists of applicants or shortlisted candidates was published. In fact, it is stated in bold in the advert that, "Only shortlisted candidates will be contacted."

The petitioner claims that the recruitment process was opaque and unaccountable, because the lists of applicants, and shortlisted candidates to be interviewed, and the venues and times of scheduled interviews were not advertised in the Press.

That there was an obligation in law under Article 35(3) of the Constitution as read together with section 5 of the Access to Information Act, 2016 to publish and publicise both the list of applicants and the shortlisted candidates.

That contrary to Section 37(4)(d) and (e) of the Public Service Commission Act No. 10 of 2017 the advert for the vacancy did not provide the terms of employment and the applicable remuneration including salary, allowances and other benefits. Instead, on terms of service and remuneration the advert simply stated: "KPC offers a competitive remuneration package in line with public service guidelines. The appointment will be for a contractual period of three (3) years, renewable once for a similar period of time subject to satisfactory performance and delivery of set performance targets and outcomes."

That the advert also did not provide for public participation contrary to Articles 10 and 232 of the Constitution.

That contrary to Article 201(d) of the Constitution which decrees that "*public money shall be used in a prudent and responsible way,*" and Article 232(1)(b) which requires the "*efficient, effective and economic use of resources,*" the 1st respondent wasted colossal sums of public funds conducting the recruitment exercise outside the confines of the law to archive an undisclosed collateral purpose.

That the interviews which were conducted on 21st and 22nd November 2019 were conducted in a shambolic manner and in particular:

1. The interview panel comprised of nine (9) directors five of whom were from the same ethnic group, hence, the panel did not have the face of Kenya, and could not be seen to be impartial.
2. Both Mr. Andrew Kamau, PS Petroleum, and Mr. Brian Muriuki, his alternate, participated in the exercise by conducting the interviews. Mr. Brian Muriuki is a consultant in the State Department of Petroleum. He is not a Civil servant qualified to be an alternate director. The presence of Brian on the panel made him a stranger in an exercise that was also attended by the PS, the substantive director. Therefore, the interview exercise was null and void to the extent that a stranger, Mr. Brian Muriuki also interviewed candidates, and tainted the process with illegality.
3. Two of the nine (9) shortlisted candidates in the second advert did not appear for the interviews - this may be attributed to the confusion which arose due to the short notices that were given, changing interview dates very close to the event.
 - The first notice was on 13th November 2019 for interviews to be held on 21st and 22nd November 2019. Then on 15th November an email cancelling the 13th November notice, changed the interview dates from 21st and 22nd November, and brought them forward by one day to 20th and 21st November 2019. The email was by the Board chair. This was communicated by the Company Secretary to the candidates.
 - Late evening on the same day, on 15th November, 2019, communication from the Company Secretary stated as follows: further to the email we sent this morning, we wish to seek your further indulgence in that matter. I am advised by the board chairperson that again due to circumstances beyond control the interview dates and time as communicated this morning have been rescheduled to Thursday, 21st November. Hence, the interview date reverted back to Friday, 21st November.
4. The interviews did not commence early morning as planned. This is because the Board decided to hold an impromptu Board meeting first before conducting the interviews. This was not communicated to the candidates.
5. Social media had all along speculated that Dr. Macharia Irungu was the preferred candidate by the Board Chair, and that the Chair would influence the outcome of the interviews to have the preferred candidate sail through. This candidate is said to have been

among the first applicants in the first advert but since he did not meet all the requirements that is why no information on the first advert was released.

6. The scoring took on a tribal bent with the four members from one ethnic community deliberately under marking and awarding low scores to candidates from other ethnic groups while padding the marks of their preferred candidates from their communities.

7. The scaring of each interviewer on the panel was not made public.

That because of these issues raised above, the impugned recruitment process was, contrary to the legitimate expectations, irredeemably tainted with violations of the law, conflicts of interest, malice, bias, and an abuse of power.

The petitioner avers that the 11th Interested Party is leaving his lucrative job as the Managing Director of Gulf Africa Petroleum Corporation (GAPCO), where he was earning a monthly salary of some Kshs.2.4 million to take up a job where he is supposed to earn a comparatively much lower figure of some Kshs.700,000/= only.

The petitioner wonders why the Board left out salary scales from the job advert in issue and, claims that there was a collusion for an improper motive.

That there is also a potential conflict of interest emerging given that GAPCO, which the 11th Interested Party has been managing, is one of KPC's main clients.

The petitioner prayed that the Court to intervene and by stopping the impugned process for the recruitment and the appointment of the KPC Managing Director.

The petitioner further posits in the petition that Articles 232(1)(h) and (i)(ii) of the Constitution on ethnic balance or representation of Kenya's diverse communities, and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of the members of all ethnic groups were violated to the extent that out of the nine (9) members of the KPC Board, five (5) are from one ethnic group.

That Articles 1(1), 2, 3(1), 4(2), 10 and 47 of the Constitution on the rule of law were violated to the extent that the impugned recruitment process was undertaken in violation of clear provisions of the constitution and legislation.

That the opaque manner of recruitment, where the Board failed to publish the lists of applicants, and also failed to publish the names of shortlisted candidates and the venues of the interviews violated both the Constitution and legislation, being Articles 10(2)(c), 35(3), 47(1) and 232(1)(f) of the Constitution, and Section 5 of the Access to Information Act, 2016.

That the failure to provide for public participation in the impugned recruitment process for the KPC Managing Director violated Articles 10, 47 and 232 of the Constitution.

That the actions of the respondents violated the legitimate expectations under the law that the respondents would execute their mandate strictly in accordance with the law.

That the court be pleased to determine the following questions–

1. Whether the composition of the KPC Board is irregular and unconstitutional to the extent that it has five members from one ethnic group?
2. Whether the Board was under obligation to but failed 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?
3. Whether the Board was under obligation to but failed to provide for public participation in the impugned recruitment process for the KPC Managing Director?
4. Whether the presence of both the substantive director and his alternate on the interview panel voided the entire exercise?
5. Whether the impugned recruitment process for the position of the KPC Managing Director is unconstitutional and, therefore, invalid, null and void ab initio.

The petitioner prayed for –

- 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.

In response to the petition the respondents and filed a replying affidavit of John Ngumi, the 1st Interested Party on behalf of the 1st respondent and the 1st to 11th Interested Parties. In the replying affidavit he deposes that KPC is a State Corporation established under the Companies Act (CAP 486) Laws of Kenya (repealed) with the mandate of inter alia transporting, storing and delivering petroleum products to the consumers of Kenya through its pipeline system and oil depot network. KPC has a Board of Directors whose role, duties and obligations are encapsulated in inter alia the Companies Act 2015, its Memorandum and Articles of Association and the State Corporations Act Cap. 446 Laws of Kenya.

That for efficiency, most of the oversight and strategy functions of KPC Board are exercised through specialized Board Committees including the Audit Committee; the Finance Committee; the Human Resources Committee; and the Technical Committee. As a consequence, most Board meetings are convened to consider these Committee reports.

That KPC is fully owned by the Government of Kenya i.e. 99.9% of its shares are owned by the National Treasury whereas the Ministry of Petroleum and Mining (hereinafter "MOPM") holds the remaining 0.1%. Accordingly, the Cabinet Secretary MOPM is responsible for the general policy and strategic direction of KPC while its general management is subject to provisions of the State Corporations Act.

That the current KPC Board is composed of the following members;

i. Chairperson of the Board of Directors - an appointee of the President of the Republic of Kenya.

ii. Principal Secretary, National Treasury or his/her alternate.

iii. Principal Secretary, State Department of Petroleum or his/her alternate.

iv. The Attorney General or his/her alternate.

v. KPC Managing Director

vi. Major (Rtd) Iltasayon Neepe.

vii. Winnie Mukami.

viii. Rita Okuthe.

ix. Jinaro Kibet.

x. Wahome Gitonga

That the Corporate members of the KPC Board are corporate agencies who have perpetual succession whereas the human persons appointed to the Board are either appointed by the President or the Cabinet Secretary Ministry of Petroleum and Mining (MOPM).

That the human persons currently serving in the Board are as hereunder;

a. John Ngumi;

b. Major (Rtd) Iltasayon Neepe;

c. Winnie Mukami;

d. Rita Okuthe;

e. Jinaro Kibet; and

f. Wahome Gitonga.

That it is regrettable for the Petitioner to exaggerate tribal affiliation in a Board which has no nexus to such affiliation.

That this Board represents the interests of the sole shareholder namely, the Government of the Republic of Kenya as well as the people of the Republic of Kenya.

That following the expiry of the former Managing Director's first contract of service and his opting not to seek a renewal thereof, the KPC Board commenced the process of recruitment of a Managing Director.

That at a Board meeting held on 16th July 2019, it was resolved that advertisements for the position of Managing Director be placed in the local dailies of wide circulation on Friday 19th July 2019; Monday 22nd July 2019 and on KPC's website.

That pursuant to the resolution afore deponed, advertisements were placed in local dailies of wide circulation on 19th July and 22nd July 2019 in the Daily Nation; Business Daily; The Standard; The Star; and The People and on 22nd July 2019, the advertisement was placed in the East African. The advertisement was also placed on KPC website.

That following the advertisement, 92 applications were received within the specified period. Initial evaluation to confirm compliance with mandatory requirements e.g. academic qualifications was carried out by the Board Human Resource Committee (BHRC).

That the Board had requested Public Service Commission to depute representatives to assist and guide the recruitment process. Accordingly, Public Service Commission deployed Mr. Isaac Shaasha and Ms. Judith Walubengo.

That the representatives afore deponed together with the members of the BHRC which included a representative of the Inspectorate of State Corporations namely, Mr. Isaac Omondi Odek carried out the initial evaluation.

That from the 92 applications that were received, the BHRC comprising of the persons afore deponed determined that only 3 applications were compliant with the requirements that were set out as a minimum qualification for the position of Managing Director.

That in a Board meeting held on 18th September 2019, the BHRC reported to the Board that only 3 applicants had met the basic minimum qualifications.

That the Board deliberated and resolved to re-advertise the vacant position since the Board is ultimately required to submit 3 names to the Cabinet Secretary MOPM and it would be a travesty to only interview the 3 compliant applicants.

That arising from the foregoing, the non-responsiveness of the first recruitment process was as a direct consequence of the fact that only 3 applicants had met the basic qualification.

That those pursuant to the resolution to re-advertise the vacant position, advertisements were placed in local dailies of wide circulation on 23rd September 2019 in the Daily Nation; Business Daily; The Standard; The Star; The People and The East African.

The advertisement was also placed on KPC website.

That in the second re-advertisement, the Board indicated that the persons who had applied earlier would require to re-apply. This is because no determination on merit had been made on any of the 92 applications.

That pursuant to the re-advertisement, 88 applications were received within the specified period.

That the applications were subjected to an initial evaluation by the BHRC comprising the persons mentioned in paragraph 15 and 16 above. Upon evaluation, 31 applications were found compliant at that stage and were to be subjected to further scrutiny.

That upon receiving the BHRC report, the Board deliberated and a final shortlist of 9 candidates for interview by the Board was approved. Interviews were set for 21st and 22nd November 2019.

That however, on 13th November 2019, the National Assembly's Energy Committee directed the KPC Board to appear before it in a National Assembly Committee session in Mombasa between 21st and 24th November 2019. The National Assembly Committee made it abundantly clear that it was obligatory for the Board to attend.

That by a letter dated 14th November 2019, the Acting Managing Director, Mr. Hudson Andambi requested the Clerk to the National Assembly for the Board to meet the Committee on 29th November 2019. The Clerk to the National Assembly assented to the request made by Mr. Andambi and the Board was thus free to conduct the interviews on the set dates.

That any the changes on interview dates were communicated to the candidates in good time. No candidate complained about interview dates or time since adequate notice was given to each candidate.

That notwithstanding that all shortlisted candidates were informed in good time of the dates of the scheduled interview, Eng. Peter Gichohi and Mr. Joseph Atonga on 17th November and 21st November 2019 respectively informed the KPC Company Secretary of their inability to attend the interview due to "*pre-arranged work activities*" and "*personal reasons*".

That the Board conducted the interviews on 21st and 22nd November 2019 and 7 candidates out of 9 presented themselves and were given every opportunity to express themselves.

The Board members who participated in the interviews and scored the individual candidates were –

- i. Chairperson – Mr. John Ngumi;
- ii. The alternate to the PS Treasury - Mr. Eric Korir;
- iii. PS in the MOPM - Mr. Andrew Kamau;
- iv. The representative of the Attorney General – Ms. Sophia Sitati;
- v. Ms. Rita Okuthe;
- vi. Ms. Winnie Mukami;
- vii. Mr. Jinaro Kibet;
- viii. Mr. Wahome Gitonga; and
- ix. Major (Retired) Iltasayon Neepe

That although the alternate to the PS MOPM attended, he did not participate in the scoring of candidates since the member i.e. the PS MOPM was himself in attendance.

That the Acting Managing Director, Mr. Hudson Andambi had applied for the vacant position of KPC Managing Director and was indeed shortlisted for interview. Consequently, he was excluded from the interviewing Panel.

That every Board member scored each candidate and the Marking Sheet was immediately handed over to the representatives from Public Service Commission. Every Board member gave the score sheet to the representatives of the Public Service Commission upon conclusion of each interview and without consultation with other Board members.

That at the conclusion of all the interviews, the grades attained by each candidate were tallied by the Public Service Commission. A final tally was prepared showing the marks obtained by each candidate. The final score is the unanimous verdict of all the Board members and were duly signed by each Board member

That from the final tally, the top three candidates and the respective scores were as follows;

- a. Dr. Macharia Irungu – 78.1%.
- b. Leparan Gideon Morintat – 66.9%.

c. Eric S. Odipo – 61.3%.

That thereafter the names of the 3 top candidates and their respective scores were submitted to the Cabinet Secretary for consideration.

That by letter dated 28th November 2019, the Cabinet Secretary MOPM informed the Board that upon consideration, he had appointed Dr. Macharia Irungu as the Managing Director KPC and directed the Board to formalize the appointment.

That the Board in a meeting held on 2nd December 2019 considered the 3 top candidates and their respective scores, took into account all the observations made and in exercise of the powers vested in the Board unanimously appointed Dr. Macharia Irungu as the Managing Director, KPC. Consequent to the appointment, a Contract of Employment was executed as between KPC and Dr. Irungu.

That the decision by Dr. Irungu to accept a position that offers lesser remuneration so as to serve this country should be applauded rather than be used as a tool for condemnation or ridicule.

That not only were the advertisements for the position of KPC Managing Director placed in several newspapers of wide circulation, they were also placed on the KPC website. Indeed, regular updates on the progress of the recruitment process including the number of compliant applications, the names of the shortlisted candidates and the dates and venue of the interviews was provided on the Company website, particulars whereof were provided on the initial advertisement as well as the re-advertisement for the position of KPC Managing Director.

That the advertisement having been posted on KPC website, it enabled any member of the public to participate and interact in the process. A website is more communicative to members of the public than a newspaper given internet is more readily accessible to members of the public than a daily newspaper which has less penetration.

That as conceded by the Petitioner, the recruitment process was a matter of national discourse on both print and social media. Such discourse can only have been based on information. Upon conclusion of the recruitment process, the Cabinet Secretary MOPM in a press release on 28th November 2019 announced the appointment of Dr. Macharia Irungu as the KPC Managing Director.

That the right to access to information in terms of Article 35 of the Constitution as effected by the Access to Information Act is both passive and active, the Petitioner cannot found his Petition on the allegation that particular information was not provided in absence of a request for that information.

That the advertisements clearly indicated under the sub-heading "*TERMS OF SERVICE AND REMUNERATION*" that KPC offers a competitive remuneration package "in line with public service guideline".

That this information met the requirements of Section 37 of the Public Service Commission Act 2017 as the remuneration of all staff of State Corporations is within legally defined "*band*" set out in the Guidelines for Terms and Conditions of Service for Chancellors of Public Universities, Board Chairpersons, Board Members and Staff of State Corporations, the State Corporations Act and the law. Hence, any remuneration including allowances and other benefits could only be within those bands.

That members of the public participated in the entire recruitment process either directly as deponed in paragraph 42 above or through the representatives of the Attorney General, the Inspectorate of State Corporations and the Public Service Commission who took part in the entire process. Further, any feedback submitted was taken into account.

That upon submission of the names of the 3 candidates, the Cabinet Secretary MOPM had the discretion to appoint any of those candidates.

That by a Memo dated 5th December 2019, the Acting Managing Director, Mr. Hudson Andambi informed the Board that he had no hand in the commencement of this suit. That the term of the Acting Managing Director, Mr. Hudson Andambi expired on 1st January 2020. It was thus vital and in the public interest that the successful candidate for the vacant position of KPC Managing Director commences his employment on 2nd January 2020.

That the allegations made by the Petitioner were baseless, distorted and calculated to advance partisan interests.

The 2nd and 3rd respondents and 8th Interested Party responded to the petition through the replying affidavit of ANDREW N. KAMAU sworn on 23rd December 2019. He deposes that the Ministry of Petroleum and Mining is responsible for the policy formulation and regulation of the petroleum and mining sectors in Kenya. The Ministry enhances commercialization of discoveries, develops the requisite skills and infrastructure for production in the oil, gas and other minerals and improves access to competitive, reliable and secure supply of petroleum products through sustainable development.

That the Ministry and its Cabinet Secretary (the 2nd Respondent herein) draw their mandate, functions and powers from the Constitution of Kenya, 2010, the constituting Executive Order, the Mining Act, 2016, the Petroleum Act, 2019, the Energy Act, 2019 among other legal instruments.

That both the Petition and Application as filed herein are bad in law and lack merit and should be struck out as they disclose no constitutional violations.

That the Petitioner failed to utilize the statutory mechanism available to him under Article 35 of the Constitution and section 5 of the Access to Information Act, 2016 to get the interview scoring sheets and other information he claims was withheld by the 1st Respondent.

That the Petitioner failed to utilize the statutory mechanism available to him under Section 43 of the National Cohesion and Integration Act, 2008 which allows him to make a complaint in the event of alleged discrimination or other impropriety in the recruitment of the 11th Interested Party.

That the Petitioner failed to utilize the statutory mechanism available to him under sections 60 and 62(1)(f) the Public Service Commission Act, 2017 which equally allows him to make a complaint in the event of alleged discrimination or other impropriety in the recruitment of the 11th Interested Party.

That the Petitioner has failed to demonstrate that the above statutory mechanisms have been utilised. They have resultantly been deliberately avoided thereby unjustifiably invoking the court's jurisdiction.

That the 1st Respondent is properly constituted in accordance with the Constitution of Kenya, 2010, all applicable laws and instruments of the Kenya Pipeline Company Limited (KPC) of the seven members appointed by the 2nd Respondent, only two are from one ethnic community. The other members not appointed by the 2nd Respondent are members of the 1st Respondent by virtue of the other offices they hold in the public service, including the 8th Interested Party.

That the Petition is supported by inadmissible evidence. Newspaper cuttings and printed copies of purported social media posts by individuals not involved in the Petition are not only inadmissible, but are also insufficient to support any of the sensational allegations of "violations of law, conflicts of interest, malice, bias, abuse of power, nepotism, favouritism and/or other improper motives or corrupt practices contained in the Petition.

That it is not in the public interest that the prayers sought in the petition are granted. The Kenya Pipeline Company Limited owns and manages a unique public utility petroleum products pipeline and associated infrastructure. Prayers sought would jeopardise the efficient supply of petroleum products across the country.

That the 11th Interested Party's recruitment and appointment was done transparently, competitively and above board subsequent to advertisement and interviews that were carried out.

That the Petition before court has been overtaken by events thus defective for reasons that the appointment has already taken effect.

That there are laid down precedents stopping court from prohibiting/staying an event/act that has already occurred.

That the particulars of violation as enshrined in the Petition are so generalised not specifying what was allegedly done or not done by the 1st Respondent and as such the same should not be relied on by court as there is no particularization of the alleged violation of the Constitution.

That the Petitioner has not demonstrated how the Respondents have acted in violation of the Constitution and the applicable law.

That the Petitioner does not have a justiciable labour dispute against the 2nd Respondent.

That the Petition therefore does not prove any constitutional violations apart from bare allegations. It is not enough to allege that a constitutional right has been violated but the same must be supported by facts and law.

That the Petition as drawn is defective and bad in law as the Claimant has not disclosed any cause of action against the of the 2nd and 3rd Respondents and the 8th Interested Party.

That this Court therefore lacks the requisite jurisdiction to hear and determine the matter against the 2nd and 3rd Respondents and the 8th Interested Party in the light of the provisions of the law.

That the petition filed herein against the 2nd and 3rd Respondents and the 8th Interested Party is a waste of the court's time and an abuse of the due process of the law.

That the petition is frivolous, vexatious and an abuse of the due process of this Court and should therefore be dismissed with costs.

The petition was disposed of by way of written submissions which the parties highlighted in court.

Determination

Each of the parties set out their issues. For the petitioner the issues he synthesised for determination are the following –

1. Whether the composition of the KPC Board is irregular and unconstitutional to the extent that it has five members from one ethnic group?
2. Whether the Board was under obligation to but failed 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?

3. Whether the Board was under obligation to but failed to provide for public participation in the impugned recruitment process for the KPC Managing Director?
4. Whether the presence of both the substantive director and his alternate on the interview panel voided the entire exercise?
5. Whether the impugned recruitment process for the position of the KPC Managing Director is unconstitutional and, therefore, invalid, null and void ab initio.

The 1st respondent, 1st to 7th and 9th to 11th Interested Parties lists the issues for determination are –

- i. Whether ethnic affiliations can be attached to the KPC Board as constituted during the recruitment process of KPCL Managing Director.
- ii. Whether the advertisements for the vacant position of KPC Managing Director was in tandem with the provisions of Section 37(4) (d) and (e) of the Public Service Act No. 10 of 2017.
- iii. Whether information regarding the recruitment process of KPCL Managing Director was accessible to members of the public.
- iv. Whether reasonable opportunity for public participation was provided in the recruitment process of KPCL Managing director.
- v. Whether the petitioner has laid any basis for grant of the orders sought.

The 2nd and 3rd respondents and 8th Interested Party listed the issue for determination as –

- a. Whether the petitioner has failed to utilize the statutory mechanism available to him before filing this suit.
- b. Whether the petition raises any constitutional issues.
- c. Whether the petitioner has satisfied the burden of proof.
- d. Whether the petitioner is entitled to the prayers sought.
- e. Who bears the cost of the suit.

From the issues set out by the parties I think the issues arising for determination are the following –

- 1. Whether the PLC Board was properly constituted at the time of recruitment of the 11th Interested Party.**
- 2. Whether the interview process for the position of Managing Director of KPC was in compliance with the Public Service Act.**
- 3. Whether reasonable opportunity was given for public participation.**
- 4. Whether the petitioner has laid basis for grant of the orders sought.**
- 5. Who will bear the costs.**

Whether the KPC Board is properly constituted

Article 232 sets out values and principles of public service as follows –

232. Values and principles of public service.

- 1. The values and principles of public service include—**
 - a. high standards of professional ethics;**
 - b. efficient, effective and economic use of resources;**
 - c. responsive, prompt, effective, impartial and equitable provision of services;**
 - d. involvement of the people in the process of policy making;**

e. accountability for administrative acts;

f. transparency and provision to the public of timely, accurate information;

g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

h. representation of Kenya's diverse communities;

and

i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

i. men and women;

ii. the members of all ethnic groups; and

iii. persons with disabilities.

2. The values and principles of public service apply to public service in—

a. all State organs in both levels of government; and

b. all State corporations.

3. Parliament shall enact legislation to give full effect to this Article.

The petitioner faults the constitution of the KPC Board on grounds that 5 out of its nine members belong to one tribe violates Article (1)(h).

The petitioner's averment is based on the names of the members of the Board as he has not provided any other evidence to prove the tribal origins of the members of the Board.

As pointed out by Mr. Ngatia, the petitioner has not proved the averment that 5 of the Board members of KPC are from one tribe. Mr. Ngatia relied on the case of **Legal Advice Centre AKA Kituo Cha Sheria v Attorney General and 3 Others (2015)** where the court observed –

“No evidence was tendered to support that allegation and Kituo has not addressed the issue at all. Having so said, can the name of a person be sufficient evidence of his ethnic origin? I think not and the Court cannot presume that Ngaruiya is necessarily a Kikuyu and Bondet is necessarily a Kalenjin. In addition, it has been said time and time again that it is not enough to allege that a particular Article of the Constitution has been contravened without giving evidence of the manner it has been violated;”

Further as was noted by Mr. Ngatia only 5 members are appointed by name, the others being appointed by reference to office such that whoever is the holder of the office at any one time, irrespective of the tribe would become a member of the Board.

I do agree with and find that the petitioner has not established that 5 out of the 9 Board members of KPC were from one tribe in violation of Articles 232(1)(h).

I thus find no proof of violation of Article 232(1)(h) in the manner averred by the petitioner.

Whether the interview process was in compliance with the law

The 1st respondent has set out in detail the process undertaken

by the Board in appointment of the Managing Director. The specific issues raised by the petitioner are that the advertisement did not comply with Section 37(4)(d) and (e) of the Public Service Commission Act and thus was in violation of the Rule of Law. He further avers that there was no pluck participation, that both the substantive and the alternate of the PS Petroleum, Mr. Andrew Kamau and Mr. Brian Muriuki, participated in conducting the interviews and that no list of applicants and those shortlisted were made public. That for these reasons the process was opaque and violated Articles 10 and 232(1) as well as Article 35(3) of the Constitution, and Section 5 of Access to Information Act.

The respondents and Interested Parties submitted that the advertisement was placed in the Daily Nation, Business Daily, The Standard, The Star, The People and The East African. That no request was made by any person regarding clarification of the advertisements, that Board Committee on Human Resource Co-opted Mr. Isaac Omondi from the Office of Inspector of State Corporations in shortlisting and Mr Isaac Shaasha and Ms. Judith Walubengo from the Public Service Commission participated in the recruitment process. The minutes containing the score and copies of the score sheets were as exhibit JN9 to the affidavit of John Ngumi sworn on 16th December 2019. It shows that only

Mr. Kamau, the PS, scored the candidate and not his alternate.

It is submitted by the Attorney General for the 2nd and 3rd respondents and 8th Interested Party that the petitioner did not utilise the statutory mechanisms available to him under Article 38 of the Constitution and Section 5 of Access to Information Act to obtain the information he needed before coming to court. That he further did not utilise the statutory mechanism under Section 43 of the National Cohesion and Integration Act to file a complaint on discrimination or other impropriety in the process of recruitment of the 11th Interested Party.

Further, that the petitioner failed to utilise the mechanisms under Section 60 and 62(1)(f) under the Public Service Commission Act to make a complaint of any alleged discrimination in the said recruitment process.

In the matter of **Republic v National Super Alliance (NASA) Kenya and 6 Others**, the court discussed the principle of exhaustion in detail and concluded that where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted. The same was held in the case of **Night Rose Cosmetics (1972) Limited v Nairobi County Government and 2 Others (2018) eKLR**.

On the question of disclosure, the court in **Katiba Institute v Presidents Delivery Unit and 3 Others** held that information held by the state is accessible by citizens on request.

I agree with the respondents and Interested Parties. The petitioner herein did not make any effort to exhaust the statutory machinery available to him to try and obtain the information he complains about in his petition before he filed the instant petition.

It is my finding that interviews for the position of Managing Director for KPC were carried out in compliance with all relevant constitutional statutory provisions and that had the petitioner used the statutory avenues available he would have been supplied with all the necessary information so that perhaps there would have been no necessity to file the petition herein in so far as the provision of information is concerned.

Whether reasonable opportunity was given to the public participation

As has already been stated above the vacancy for the position of Managing Director of KPC was widely advertised in several daily and weekly papers and on the website of the 1st respondent.

Advertisement is sufficient invitation to members of the public to participate by either applying or seeking information about the applicants. The Section 37 of the Public Service Commission provides as follows –

37. Advertisement of vacancies

- 1. Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.**
- 2. The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.**
- 3. The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.**
- 4. An advertisement inviting applications to fill any vacancy in a public office shall provide for —**
 - a. the title and rank of the public office;**
 - b. the public body in which the office is tenable;**
 - c. the background and context of the work, where necessary;**

The details in Section 37(4) were contained in the advertisement as produced by the petitioner at pages 4 and 5 of “*Exhibit 000-1*” to the petition.

In the case of **Nairobi Metropolitan PSV Saccos Union Limited and 2 others v County of Nairobi Government and 3 others [2013] eKLR**, this court noting that “*information in the website is easily accessible to the public*” stated that “*If does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation*”.

Neither the Petitioner nor any other member of the public requested for any specific information regarding the process and was denied.

In the case of **Consumer Federation of Kenya (COFEK) v Attorney General and 2 others [2012] eKLR**, the Court stated regarding the right to access to information that;

“It is a right that implicitly recognizes that the citizen has a role to play, and indeed a responsibility, in prying open the affairs of state in order to achieve *the values of the Constitution*. Had the petitioner utilized the right granted to it by the provisions of Article

35, it would have been unnecessary to found part its case on hearsay statements from unnamed and unidentified sources contained in media reports."

In the case of **Saniako N. Kibiwot v Land Control Board, Marakwet Division and 2 Others [2019] eKLR**, the Court reiterated that –

"It is trite that in order to stand a chance of successfully moving the court in a petition such as this one the petitioner must demonstrate that he first sought the information from the appropriate office and that he was denied the same or that his request was not responded to."

I find that the respondents and Interested Parties did into deny the public the opportunity to participate in the appointment of Managing Director.

Whether the petitioner has laid a basis for grant of orders sought

The petitioner has raised several issues about the appointment of the 11th Interested Party as Managing Director of KPC. He is particularly uncomfortable with the tribe of the Managing Director whom he avers is a Kikuyu and would make the ethnic balance in the KPC Board which he avers is already ethnically imbalanced to be worse. As I have already pointed out, the petitioner has not submitted evidence of the tribal imbalance except by reference to names.

The fact that the petitioner has not proved the allegations made herein however does not mean that the petition is frivolous. The issues he raised, if he had proved them, would have provided sufficient ground for intervention by the court.

I thus decline to make a finding of frivolity. In the same breath I decline to punish the petitioner by ordering him to pay costs. It is only public spirited human rights defenders like the petitioner who serve as a watchdog and defender of the Constitution, the rule of law and the public interest.

I thus make an order that each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE