



Ogiek Independent Council of Southwest Mau Forest (Konoin – Bomet) & 4 others v Independent Electoral and Boundaries Commission & another; County Government of Bomet & 2 others (Interested Parties) (Petition 2 of 2022) [2023] KEHC 18042 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

PETITION 2 OF 2022

RL KORIR, J

MAY 25, 2023

IN THE MATTER OF THE CONSTITUTION OF THE

REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 1,2,3,19 (2) (3), 21,

22, 23, 27, 28,35, 38, 81, 88, 89, 159, 165 AND

258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION (IEBC) ACT

AND

IN THE MATTER OF THE INTERNATIONAL

COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE

EXPECTATION

-BETWEEN –

BETWEEN

OGIEK INDEPENDENT COUNCIL OF SOUTHWEST MAU FOREST (KONOIN

– BOMET) 1ST PETITIONER

KOROS KIPRONO WILLIAM 2ND PETITIONER



CHARLES KIBET NG'ETICH 3RD PETITIONER
REUBEN KIPROTICH TALAM 4TH PETITIONER
JOSEPH KIPRONO KOECH 5TH PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

COUNTY GOVERNMENT OF BOMET INTERESTED PARTY

BOMET COUNTY ASSEMBLY INTERESTED PARTY

CENTRE FOR MINORITY DEVELOPMENT RIGHTS INTERESTED PARTY

RULING

1. The Petitioner filed the present Petition dated 4th April 2022 and filed under Certificate of Urgency on 28th April 2022. The 1st Petitioner is a registered Society under section 10 of the *Societies Act* and a representative of the Ogiek community, an indigenous tribe residing in the Mau Forest and more particularly, Embomos Ward in Bomet County.
2. The 2nd, 3rd, 4th and 5th Petitioners are members of Ogiek Community, residing and working for gain in Embomos Ward, in Konoin Constituency within Bomet County.
3. The 1st Respondent is an independent institution established under Article 88 of *the Constitution* of Kenya and responsible for the conduct and supervision of referenda and elections of any elective office established by *the Constitution* or other Acts of Parliament.
4. The 2nd Respondent is an institution established under the Office of the Attorney General Act 2012.
5. The 1st and 2nd Interested Parties are institutions established under Article 176 of *the Constitution* of Kenya while the 3rd Interested Party is a non-governmental organization working with minority and indigenous peoples in Kenya.
6. Along with the Petition the Petitioner filed the Present Application premised on Articles 22 (1), (2) (b), 23 and 159 (2) (b) & (d) of *the Constitution*; and Rules 4 (1), (2) & 23 of the *Constitution of Kenya (Protection and Fundamental Rights & Freedoms) Practice Procedure Rules*. They seek Orders as follows:-
 1. SPENT
 2. Pending the hearing and determination of this matter, this Court do direct the Respondents to create and gazette four (4) polling stations for the Ogiek Forest Community residing within the periphery of Mau Forest within Embomos Ward in Bomet County.
 3. Pending the hearing and determination of this matter, this Court do direct the Respondents to register the new eligible voters who were not registered as a consequence of the Respondents' failure to create sufficient and closer polling stations for the Ogiek Forest Community.



4. Pending hearing and determination of this matter, this Court be pleased to direct the Respondents to allow the transfer of voters for members of the Ogiek Community who registered elsewhere as a result of the Respondent's failure to provide sufficient and closer polling station.
5. Costs.
7. This Application is premised on the following grounds: -
 1. That on 21st September 2011, the Ogiek Community members through their council members appeared before The Truth, Justice and Reconciliation Commission (TJRC) and presented a written memorandum claiming not only restitution to their ancestral home but also a right to exercise their right to vote.
 2. That in response, the then chair of The Truth, Justice and Reconciliation Commission (TJRC) Mr. Bethwel Kiplagat wrote a letter dated 7th September 2012 appealing to the Independent Electoral and Boundaries Commission (IEBC) to create four polling stations for the Ogiek Community in Bomet County, Konoin Constituency, Embomos Ward.
 3. That the Independent Electoral and Boundaries Commission (IEBC) failed to create the said four polling stations and instead created only one polling station being Kusumek Polling Station Number 119 which is totally inconvenient for the bulk of the Ogiek Community living at the periphery.
 4. That on the 9th December 2020, the Ogiek Forest Community through the Ogiek Independent Council presented a written memorandum to the chairman of the Independent Electoral and Boundaries Commission (IEBC) and copied it to the Bomet County Election Manager and Konoin Constituency Election Co-ordinator which addressed the question of delimitation of the larger Embomos Ward into two and the creation and gazettement of four extra registration and polling centres in the extreme end of five major earmarked zones of the Embomos Ward inhabited by the Ogiek Forest Community.
 5. That on 19th, 22nd, 26th and 27th January 2021, the representatives of the said Ogiek Forest Community embarked on public participation in their application to the Independent Electoral and Boundaries Commission (IEBC) to review and delimit the larger Embomos Ward and create and gazette the said four extra polling stations in Bomet County Public Administration Barazas and Bomet County Public National Administration Barazas to ensure that their long overdue application and grievances of civil voting rights were realized.
 6. That on 23rd March 2021, the Ogiek Forest Community forwarded a reminder to the chairman of the Independent Electoral and Boundaries Commission (IEBC) addressing the urgency of the review and delimitation of the large and vast Embomos Ward in Bomet County and creation of four polling stations so as to assist in reaching the members of the marginalized Ogiek Community.
 7. That prior to the presentation of the memorandum, the members of the Ogiek Community in various peripheries of Embomos Ward wrote Minutes which resulted in the four proposed polling stations which were presented vide the said memorandum.
 8. That after presenting the said memorandum, the Independent Electoral and Boundaries Commission (IEBC) responded by acknowledging receipt of the memorandum and stated



that the Application will be considered in the appropriate time at the election calendar, an act which has not been done to date.

9. That on 24th February 2022, the Ogiek Forest Community presented the 3rd written memorandum reminding the Independent Electoral and Boundaries Commission (IEBC) of their application for delimitation of the larger Embomos Ward and creation of four new polling stations but no response had been received to date.
10. That as a consequence of the delay by the Independent Electoral and Boundaries Commission (IEBC) to create and gazette the four polling stations, over two thousand eligible voters from the Ogiek Forest Community have not been able to express their right to vote in the last general elections.
11. That as a consequence of the acts of the Respondents herein, members of the Ogiek Forest Community have been disenfranchised as they were not able to participate in the last two general elections.

The Applicants' Case

8. The Application is supported by the Affidavit of the 2nd Petitioner, Koros William Kiprono who is the Secretary General of the 1st Petitioner. He averred that he was a resident of the Mau Forest, which formed part of his ancestral home and that his great grandfather Maritim Arap Bune was served with an eviction order during the pre-colonial times to move out of the forest. That the chairman of the 1st Petitioner lodged a complaint in 1963 in this regard and that the same was addressed by the Regional Government Agent vide a letter dated 16th October 1963 (marked 'WK5').
9. He stated in his affidavit that in 1969, the Regional Government Agent made an order to profile the 976 Ogiek families who resided in the Mau (list marked as 'WK6') and that they continued to live in Southwest Mau within Bomet County till presently. The 2nd Petitioner stated that the said Mau Forest remained a vital resource for their community which comprised 14,000 families and that it was their hope that they would be fully settled to continue practising their culture, tradition and customary rites on the said land.
10. It was the 2nd Petitioner's case that the question of recognition of the Ogiek community was heard and determined in the African Court of Justice in Arusha vide Application No. 006/2012 (copy of judgment marked as 'WK8') and that the Kenya government was tasked to resettle the Ogiek community which culminated into a task force, The Truth, Justice and Reconciliation Commission (TJRC). He also stated that The Truth, Justice and Reconciliation Commission (TJRC) wrote a letter dated 7th September 2012 (marked as 'WK11') appealing to the IEBC to create 4 polling stations for the Ogiek Community at Konoin constituency, Embomos ward and that they failed to do so and only created one polling station at Kusumek, No. 119 which was inconvenient to the Ogiek community.
11. The 2nd Petitioner also swore in his affidavit that they had presented a memorandum (marked as 'WK12') to the IEBC to address the question of delimitation of the larger Embomos Ward and the creation of two additional polling stations, which was received by the IEBC and they undertook to consider the said request at the appropriate time but had since not done so, despite subsequent memoranda reminding them of the said request.
12. It was their case that as a result of the failure of the IEBC to consider their request, over 2,000 eligible voters from the Ogiek community have been unable to exercise their right to vote in the general elections.



The 1st Respondent's Case

13. The 1st Respondent on 26th May 2022 filed a Replying Affidavit dated 23rd May 2022 signed by its Director Legal and Public Affairs, Mr. Chrispine K'Owiye. He stated that the gazettement of polling stations, registration of new eligible voters and transfer of registered voters from one polling station to another involved various administrative and fiscal logistics that were governed strictly by the law. That the 1st Respondent issued a press statement on 24th January 2022 titled "Status Update on Enhancing Continuous Voter Registration" appealing to all eligible citizens to register as voters in the second and last phase of the voters' registration exercise. That this was in the public domain and they even called upon leaders and citizens of goodwill to help mobilize eligible voters to register. That it was the Applicants who instead chose not to participate in the exercise. Further, that the Applicants had failed to demonstrate that the existing polling stations were insufficient and that their prayers would open a Pandora's box for all citizens who had delayed registering within the set timelines.
14. He also averred that the Applicants failed to demonstrate to the Court that they were prevented by exceptional circumstances from arriving at the nearby voting centres and failed to give details of citizens who ought to have been registered as voters but were never registered due to the actions or inactions of the 1st Respondent. That further, the Applicants did not demonstrate to the Court that they unsuccessfully attempted to apply for the transfer of registration of voters in the prescribed form because of being denied an opportunity by the 1st Respondent. The deponent lastly stated that the reopening of the voter registration would prejudice the 1st Respondent in terms of administrative and fiscal responsibility logistics and that the orders being sought for were belated and overtaken by events as the 1st Respondent had already embarked on and completed a voter verification exercise.

The 2nd Respondent's Case

15. The 2nd Respondent's Grounds of Opposition are dated 18th May 2022 and filed on 20th May 2022. According to the 2nd Respondent the Application was a waste of time, was fatally defective and was brought in bad faith as it was meant to advance the Petitioners' selfish interests. That the Orders prayed for by the Applicants required an elaborate process as per Article 89 of *the Constitution* and hence were not possible within the time frame provided. Further, that any conservatory orders would be to the detriment of the 1st Respondent as they would jeopardize their ability to plan for and conduct the General Elections slated for 9th August 2022 (now passed). The 2nd Respondent stated that the Applicants failed, in any case, to satisfy the essential principles for granting conservatory orders.
16. The 2nd Respondent urged that the issue of delimitation was a function of the 1st Respondent dependent on many other factors such as budgetary allocation. Lastly, the 2nd Respondent that the Applicant had failed to demonstrate the manner in which the 2nd Respondent had breached his fundamental rights.
17. The Interested Parties in this case neither responded to the Petition, and the present Application nor participated in any way.
18. This Court on 12th May 2022 directed the parties to canvass the Application by way of written submissions.

The Applicants' Submissions

19. In their submissions dated 20th June 2022, the Applicants submitted that their main prayer was seeking the gazettement of four (4) polling stations for the Ogiek Forest Community and that the other



prayers were incidental and auxiliary to this. They submitted that the Respondents had failed to give information relating to the application for the four polling stations in line with the recommendations of the TJRC despite several reminders, thereby curtailing the Applicants' right to access information contrary to Article 35 of *the Constitution* of Kenya. Further, that the failure by the Respondents to provide sufficient and closer polling stations to the Applicants curtailed their right to vote contrary to Article 38. They cited the case of *Kituo Cha Sheria vs. Independent Electoral and Boundaries Commission and Another* (2013) eKLR.

20. The Applicants submitted that the 1st Respondent was mandated under Article 83 (3) to implement the administration and arrangements for the registration of voters and the conduct of elections. That they had a right to fully enjoy their rights under Article 19 and that the State was obligated to ensure this under Article 21 (1) of *the Constitution*.
21. On the question of registration and transfer of voters, the Applicants submitted that the 1st Respondent was mandated to register voters under Articles 83 (3), 88 (4) (a) of *the Constitution* and Section 4 of the *Independent Electoral and Boundaries Commission Act* No. 9 of 2011.
22. Lastly on costs, the Applicants submitted that section 27 (1) of the *Civil Procedure Act* provided that costs were awarded according to the discretion of the court and that since costs followed the event, the Court should award them costs in the interest of justice and fairness. To this end, they cited the case of *Party of Independent Candidate of Kenya vs. Mutula Kilonzo and 2 Others* which was cited in DGM vs. EGW (2021) eKLR.

The 1st Respondent's Submissions

23. In Support of its case, the 1st Respondent filed submission on 15th July, 2022 dated 4th July, 2022. They submitted on three issues being:-
 - i. Whether they should create and gazette four polling stations for the Ogiek Community within Embomos ward;
 - ii. whether they should reopen the voter registration exercise; and
 - iii. whether they should reopen the voter transfer exercise.
24. The 1st Respondent firstly submitted that the Applicants neither demonstrated that the IEBC was served with the memoranda and letters that requested them to create the four polling stations as recommended by the TJRC nor did they (the Applicants) demonstrate that they served the necessary documents upon IEBC for action. That the Applicants had never submitted requests for the creation of new polling stations detailing the inadequacies and insufficiencies of the existing polling stations and such, their prayers before the Court were premature.
25. Secondly, they submitted that the creation of additional polling stations was a process that required administrative and fiscal logistics which were not within their ability at the time of the Application. In addition, they stated that such a directive would prejudice them and would be impracticable because it would offend their fiscal structure which was informed by budget allocation from the National Treasury, since they were preparing for the August 2022 General Elections.
26. They further submitted that the IEBC was an Independent Commission created under Article 88 of *the Constitution* and that section 26 of the IEBC Act together with Article 249 (2) precluded them from being bound by directives from other bodies such as the TJRC and the subsequent recommendations they made in light of creating additional polling stations for the Ogiek Community. To this end, they cited the case of *In the Matter of Interim Independent Electoral Commission* (2011) eKLR.



27. On the second issue, the 1st Respondent submitted that the Applicants did not demonstrate to the Court that they tried to register as voters during the period between 17th January 2022 and 6th February 2022 and were subsequently denied such opportunity by the 1st Respondent or prevented by exceptional circumstances. It was their submission that reopening the voters' registration process would prejudice them because of the resources required and the limited timelines. It was their argument, therefore, that the Petition was time-barred since they were now in the process of procuring ballot papers.
28. Lastly, the 1st Respondent submitted that they had concluded the voter verification process and was in the final stages of preparing for the General Elections slated for 9th August 2022. That the Applicants had not demonstrated to the Court that they attempted to apply for transfer in the prescribed form and were subsequently rejected or denied by the 1st Respondent. They urged the Court to dismiss the Application as the issues being raised were overtaken by events. Further, that the Applicants had not adhered to Regulations 15 of the [Elections \(Registration of Voters\) Regulations, 2012](#).

Issues for Determination

29. Having considered the Application the rival affidavits, the Grounds of Opposition and the respective Submissions, the main issue for my determination at this stage is whether the Application is merited or whether the conservatory orders sought should be granted. To arrive at a determination, I shall consider the following: -
- i. Whether the Applicants' right to information had been violated.
 - ii. Whether the Applicants' right to vote had been violated.
 - iii. Whether the Court can direct the IEBC on its mandate to register new eligible voters, to transfer voters from other polling stations after the close of the exercise and to create new polling stations and delimit new boundaries.
30. At the crux of this Application are conservatory orders. The locus classicus case in this regard is [Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR in which the Supreme Court determined as follows: -
- “(86) ‘Conservatory orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
31. In the case of [Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others](#), Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR, the court aptly summarized the applicable principles as follows: -
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of [the Constitution](#).



- b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
32. The above principles were also enunciated by the court in the case of *Board of Management of Uburu Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR, as follows: -
- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
33. I now consider the various issues against the parameters set out in the case law above. In so doing I am conscious that I should not delve into the merits of the case and make definitive findings as that is the preserve of the court when hearing and determining the petition.

See Nairobi Petition No. 16 of 2011, *Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General* [2011] eKLR and Petition No. E408 of 2020 *Okiya Omtatah Okoiti vs. Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties)* [2021] eKLR).

i. Whether the Applicants' right to information had been violated

34. The Applicants contended that their constitutional rights continued to be violated by the 1st Respondents. Firstly, that they had a right to information as enshrined by *the Constitution* of Kenya 2010. They urged that their communication to the 1st Respondent including correspondence and petitions had gone unanswered. That in particular they had been denied information particularly to their request to have an additional electoral ward delimited and the following creation of additional following stations.
35. Article 35 of *the Constitution* provides thus:-
- Access to Information
- 1. Every citizen has the right of access to –
 - a. Information held by the State; and
 - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
36. Similarly, the *Access to Information Act* No. 31 of 2016 at Section 4 provides: -
- 1) Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a) the State; and



- b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 - 2) Subject to this Act, every citizen's right to access information is not affected by—
 - a) any reason the person gives for seeking access; or
 - b) the public entity's belief as to what are the person's reasons for seeking access.
 - 3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
 - 4) This Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
 - 5) Nothing in this Act shall limit the requirement imposed under this Act or any other written law on a public entity or a private body to disclose information.
37. The right to information is also provided under the *Universal Declaration of Human Rights* (UDHR) adopted by the United Nations in 1948 which provides at Article 19 thus:-

‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’
38. The *International Convention on Civil and Political Rights* (ICCPR) adopted in 1966 provides also:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print in the form of art, or through any other media of his choice.”
39. It is clear from the above that, the right to information was properly embedded in both International and National law and such right was important in realizing some of the rights guaranteed under the Bill of Rights in our Constitution such as the right to vote. In the case of *Nairobi Law Monthly vs. Kenya Electricity Generating Company & 2 Others* (2013) eKLR, the High court at Nairobi held thus:-
 - “ 34. The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of *the Constitution* of Kenya which imposes an obligation on the State to ‘publish and publicize any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State...
 36. The recognized international standards or principles on freedom of information,... include maximum disclosure: that full disclosure of information should be the norm; and restrictions and exceptions to access to information should only apply in very limited circumstances; that anyone, not just citizens, should be able to request and obtain information; that a requester should not have to show any particular interest or reason for their request; that ‘Information’ should include all information held by a public body, and



it should be the obligation of the public body to prove that it is legitimate to deny access to information.....

“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35 (1) (a)... they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.”

40. In *Brummer vs. Minister for Social Development & others*, CCT 25/09 2009 ZACC 21 at paragraphs 62 – 63, it was held:-

“(62) The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed, one of the basic values and principles governing public administration is transparency. And *the Constitution* demands that transparency ‘must be fostered by providing the public with timely, accessible and accurate information.’

(63) Apart from this, access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

41. The Applicants attached a letter addressed to the chairman of the Independent Electoral and Boundaries Commission (1st Respondent) dated 7th September 2012 and marked ‘WK11’ where they requested the 1st Respondent to consider creating extra polling stations at Embomos Ward. On Record is also a Memorandum from the Ogiek Independent Council of South-West Mau Forest dated 9th December 2020 and received by IEBC County Elections Manager for Bomet County on 13th January 2021, marked ‘WK12’. A subsequent Memorandum dated 23rd March 2021 was delivered to the Chairperson of the 1st Respondent marked ‘WK13’. Alongside the various Memoranda are other documents such as Minutes and a list of the members of the Ogiek community which were all duly received either by the 1st Respondent’s Elections manager in Bomet County or by their head office in Nairobi. Further, there is an acknowledgment letter from the then Acting Commission Secretary/CEO dated 12th April 2021 in which he stated that the Commission noted the proposals in the said Memorandum Ref. BMT/KCO/2021 and undertook to consider the same at the appropriate time in the election calendar and within the provisions of the law.

42. It was the Applicants’ contention that the 1st Respondent, despite numerous reminders, failed to live up to their mandate to consider the Applicants’ requests to have additional polling stations. Further, that they were never furnished with information regarding the progress of their request and that to date, no polling stations were added in their ward. That as a result of this, their right to vote had been curtailed as the existing polling station Number 119 at Kusumek was inconvenient for the majority of their members and they could therefore not register as voters.

43. From my consideration of the numerous correspondences produced by the Applicants, it is my finding that indeed the Applicants had a right to information relating to the requests they had put forward and that in line with this, they diligently took the relevant steps in seeking to obtain information in this regard. The 1st Respondent was under an obligation to provide the necessary information in



accordance with Article 35(1) (a) by furnishing the Applicants with appropriate responses to enable them to know of the status of their requests. Failure to do so amounted to a violation of their right to access of information contrary to Article 35 of *the Constitution*.

44. In the same vein, I also dismiss the 1st Respondent's assertion that they were never served with the requests to create and gazette extra polling stations. The Applicants have demonstrated that the 1st Respondent was duly served with the said requests in the form of Memoranda and even received a response from an official of the 1st Respondent stating that they would consider their requests at the appropriate time. The decent thing was for the 1st Respondent to provide information requested by the Applicants. They bore such a duty under the law. Indeed, the duty of a public entity to provide information is a continuing one. As this Application is not an end in itself the Respondents ought to perform their duty and inform the Applicants of the status of their various requests.

ii. Whether the Applicants' right to vote was likely to be violated unless the orders were granted.

45. The right to vote is a fundamental principle in a democratic state such as ours (see Article 21 of the Universal Declaration of Human Rights). It is sacrosanct and must never be interfered with. It connotes that every citizen must be afforded an equal opportunity to make a decision as to the governance of their country through an election process.

46. The 1st Respondent (IEBC) possesses the legal mandate of the gazetting of polling stations, the registration of new voters and transfer of eligible voters as well as the duty to oversee the conduct of elections as established by Article 88 of *the Constitution*. The said Article provides as follows: -

88. Independent Electoral and Boundaries Commission

1. There is established the Independent Electoral and Boundaries Commission.
2. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
 - a. the continuous registration of citizens as voters;
 - b. the regular revision of the voters' roll;
 - c. the delimitation of constituencies and wards;
3. The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

47. *The Constitution* under Article 83 provides for the qualifications of a person for registration as a voter and IEBC's mandate in facilitating the same. It states as follows:-

83. Registration as a voter

1. A person qualifies for registration as a voter at elections or referenda if the person—
 - a. is an adult citizen;
 - b. is not declared to be of unsound mind; and
 - c. has not been convicted of an election offence during the preceding five years.
2. A citizen who qualifies for registration as a voter shall be registered at only one registration centre.



3. Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.
48. The right to vote is enshrined by the Constitution under Article 38 (3) which states: -
38. Political rights
1. Every adult citizen has the right, without unreasonable restrictions—
 - a. to be registered as a voter;
 - b. to vote by secret ballot in any election or referendum; and
 - c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.
49. It is clear from the law as stated above that it is the duty of the 1st Respondent to ensure that eligible voters are duly registered when they present themselves for registration and that such exercise be conducted on a continuous basis as provided for by Article 88 (4) (a) as read with section 5 (1) of the Elections Act 2011.
50. It was the Applicants' case that they were in need of additional polling stations at Embomos Ward, and that the 1st Respondent failed to provide additional polling stations yet the only available one was inconvenient for a majority of the members of their community. They contended that the 1st Respondent failed to provide the same to their detriment and this curtailed their right to vote in the past general elections.
51. In response, the 1st Respondent stated that the process of registering as a voter was voluntary and open to all eligible persons. It was their assertion that they had organized for a national voter registration exercise which was adequately publicized, and citizens mobilized to register as voters and verify their details. That they employed the use of chiefs, village elders and nyumba kumi officials in the process in order to have extensive outreach to citizens.
52. The 1st Respondent also stated that the Applicants did not deny that the voter registration exercise had been conducted but only complained that they wanted their own polling station. That in this regard, they ought to have demonstrated to the Court that they approached the officials of the 1st Respondent in order to be registered but were denied an opportunity to do so thereby curtailing their rights. Further, that the Applicants should have also demonstrated that they were prevented by exceptional circumstances from registering as voters. It was their case that the Applicants also did not provide any evidence of their members who had failed to register as voters on account of the actions or inactions of the 1st Respondent and therefore the Application was brought in bad faith.
53. This Court takes the view that it is the pre-election processes that determine the legitimacy of an election process which is a fundamental principle of a democratic society that upholds the rights of its citizens. Part of the pre-election process includes amongst others, the process of voter registration. In the case of *Georgian Labour Party vs. Georgia* 9103/04 (2008) ECHR 1888, it was stated thus: -

“The court considers that the proper management of electoral rolls is a pre-condition for a free and fair ballot. Permitting all eligible voters to be registered preserves, inter alia, the principles of universality and the equality of the vote, and maintains general confidence in the State administration of electoral processes.”



54. Similarly, in *Odinga & 5 others vs. Independent Electoral and Boundaries Commission & 4 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013), the Supreme Court of Kenya stated at paragraph 129 that: -

“Article 38(3) of *the Constitution* provides safeguards for the right to vote in a free and fair election, and the right to be registered as a voter. These two rights give life to every other subsequent procedure, including the constitutional creation of the IEBC, and the procedures to be used in registration, voting, transmission, tallying and verification of the results. To concretize this position, article 83 states that administrative procedures to be undertaken by IEBC are to facilitate, and not to deny an eligible voter the right to vote. This consideration must therefore be the foundation of all interpretations made to the law by IEBC, and all Courts sitting in appeal from the decisions taken by IEBC.”

55. The apex Court went on to state in the above case as follows:-

“(251)...the agency entrusted with responsibility (IEBC) for voter registration must ensure as follows:-

- (a) all those who turn out to register are qualified to be registered, in accordance with the constitutional and legal requirements;
- (b) all those who turn out to register are actually registered and their particulars accurately captured;
- (c) the administrative arrangements put in place to facilitate the registration process are simple, transparent and accessible;
- (d) the public and political actors are kept informed of the various steps in the register-preparation process;
- (e) the resultant register is verifiable.”

56. It was therefore obligatory on the 1st Respondent to ensure that all persons who were eligible to be registered as voters from the Ogiek community were able to do so in accordance with Article 6 (3) of *the Constitution* which provides that: -

“(3) A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.”

57. On the other hand the Applicants insist that some of their members were likely to be left out owing to inadequacy and inaccessibility of registration centres. The 1st Respondent has, to some extent demonstrated the steps it has undertaken to afford the eligible voters in the affected area a chance to be registered.

58. I have considered the rival arguments on whether the Applicants’ right to vote was threatened by the 1st Respondent. Needless to state, registration of voters is a process that must be backed by adequate administrative arrangements including accessibility of registration and polling centres. At this stage however, it would be difficult for the court to determine whether the Applicants’ demand for additional registration and polling centres was born out of necessity or convenience. It would take a consideration of their evidence in the Petition to arrive at such a determination.



iii. Whether the Court can direct the IEBC on its mandate to register new eligible voters, to transfer voters from other polling stations and to delimit new boundaries and create new polling stations.

59. It was the prayer of the Applicants that the Court should order the 1st Respondent to facilitate the registration of new voters and to transfer those voters who had registered elsewhere as a result of inadequate polling stations for the Ogiek community. In addition, they asked the Court to direct the 1st Respondent to create and gazette four (4) polling stations for the Ogiek Forest Community residing within the periphery of Mau Forest within Embomos Ward in Bomet County. They sought an order directing the 1st Respondent to carry out the delimitation of the larger Embomos ward into two, in addition to creating extra four polling stations specifically for the Ogiek community
60. The Applicants have given a detailed history of the Ogiek Forest Community and what they perceived as the numerous land injustices that they underwent during the colonial period including being displaced from their native settlements in the Mau Forest. They outlined the recommendations of the Truth, Justice and Reconciliation Commission in regard to their right to be registered as voters and to take part in the country's democratic processes as a marginalized community. They contend that some members of their community were scattered and thus, were registered as voters in places away from the place they called home. They further contend that a number of them did not register as voters while others registered elsewhere due to the inconvenient polling station. This formed the basis of their prayer to have the Court order the 1st Respondent to allow for the registration of new eligible members and a transfer of members of the Ogiek community who had registered elsewhere outside of the timelines.
61. In its response, the 1st Respondent (IEBC) submitted that the process of registration of voters involved various administrative and fiscal logistics with strict adherence to the law. It was their case that the second phase of the voters' registration and transfer exercise commenced on 17th January 2022 and ran until 6th February 2022.
62. In his Affidavit, the 1st Respondent's Director further stated that they carried out campaigns with the help of leaders aimed at mobilizing eligible citizens to register or transfer their votes to convenient places. He stated that they conducted mobile voter registration exercises in the County Assembly Wards where all members from all locations were reached. He also stated that IEBC would be unable to delimit and create additional polling stations within the time period that this Application was filed.
63. I will first address the issue of delimitation of boundaries. Article 89 outlines the duty of delimitation of electoral units. It states thus:-

89. Delimitation of electoral units

1. There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).
2. The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.
3. The Commission shall review the number, names and boundaries of wards periodically.
4. If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.



5. The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—
 - a. geographical features and urban centres;
 - b. community of interest, historical, economic and cultural ties; and
 - c. means of communication.
 6. The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—
 - a. forty per cent for cities and sparsely populated areas; and
 - b. thirty per cent for the other areas.
 7. In reviewing constituency and ward boundaries the Commission shall—
 - a. consult all interested parties; and
 - b. progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.
 8. If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.
 9. Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette and shall come into effect on the dissolution of Parliament first following their publication.
 10. A person may apply to the High Court for review of a decision of the Commission made under this Article.
 11. An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.
 12. For the purposes of this Article, “population quota” means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article.
64. Without going into details, it is clear from the law above that the exercise of delimitation of boundaries and gazettement of polling stations is to take place in not less than 12 months before the subsequent elections, and where the exercise happened such areas shall be excluded in the current elections.
65. Article 89 (2) and (4) of *the Constitution* are clear in that, any process of delimitation of boundaries must be carried out at least 12 months before the general elections. *The Constitution* further stipulates that any new boundaries created from the delimitation process shall be excluded from the subsequent elections. This therefore means that even if the 1st Respondent was to create new electoral boundaries, the same would not be functional for the upcoming general elections but would only take effect at a future date. It is clear from this point alone that the Applicants’ Petition and Application were clearly overtaken by events even at the time of filing. I must hasten to add that the court cannot in any case make such a definitive finding on delimitation in an Application.



66. I have further noted that the Applicants received a positive response from the 1st Respondent to consider the recommendations of the TJRC and thus, there still existed an opportunity for them to pursue their request from the 1st Respondent. Bearing in mind that the process of delimitation of boundaries was a continuous one, this Court takes the view that no prejudice would be occasioned to the Applicants in this regard.

67. On the issue of violation of their constitutional rights, the Applicants failed to adduce cogent evidence before this Court to demonstrate the same. The fact that the 1st Respondent was yet to consider their request did not in itself connote that they blatantly refused to do so. In the case of Harrikinson vs. Attorney General of Trinidad and Tobago [1980] AC 265, it was held that:-

“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.....The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

68. It follows then that a constitutional cause was unnecessary at this point and that the Applicants had other avenues for redress.

69. On the issue of registration and transfer of voters by the 1st Respondent after the stipulated period, I am alive to the sentiments of the Supreme Court in John Harun Mwau & 2 others vs. Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, where the learned bench held at para. 371 thus:-

“The processes outlined by the law relating to registration, verification, inspection, audit, transfer of registration, and updating the Voters’ Register, are all time-bound.”

70. The timelines set for the preparation and conduct of elections are well-founded under the Elections Act and the Constitution. These timelines exist to ensure that the IEBC (1st Respondent) is afforded adequate time to prepare and conduct credible elections. In this regard, it would be purposeless to go against those timelines which may in turn affect their ability to deliver on their constitutional mandate. It would be against the public interest to do so.

71. In Jeffer Issak Kaur vs. Ministry of Justice, National Cohesion and Constitutional Affairs and Others (Supra), Lenaola J (as he then was) while dealing with a suit seeking inter alia orders compel further registration of voters held:-

“Firstly, Court orders must be issued in a manner that would sustain democracy rather than stifle it or impede the realisation of its gains. In the present case, the applicant came to Court in the eleventh hour and even now as I write, the registration of voters exercise has come to an end and other legal processes towards having an organised and peaceful General Election



have commenced. The Applicant may not be to blame; IEBC promised him and others in the diaspora that they will indeed register and vote and he sat back in anticipation.....

72. It is clear to this court from the timelines left to the election that reopening of voters' registration was not legally and fiscally and logistically possible. In balancing the Applicants' constitutional right to be registered as voters and to subsequently vote, against public interest, I rely on the South African case of *Minister of Health vs. Treatment Action Campaign* 2002 (5) SA 721 (CC), where it was held thus:-

“Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. *The Constitution* contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications.... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”

73. Having considered the Application wholistically, I am persuaded that it would not serve the public interest to grant the orders for the reopening of the registration of voters, creation of additional polling stations and transfer of voters to other polling stations.

74. In the end, the Orders sought cannot be granted as the Application is over taken by events.

75. In considering the Application, I considered the issues raised in the Petition itself which are a replica of the orders sought in the Application. It is my considered view that the Petition was no longer tenable as it sought orders relevant to the National Election of 2022. While the issues may remain relevant for a future election, this court cannot deal with the Present Petition as to do so would be an academic exercise and waste of judicial time.

iv. Who bears the cost of this Application.

On costs, it is trite that costs follow the event. In this case however I have considered that the Applicants were litigating on a matter of public interest which goes to the heart of the enforcement of minority rights under *the Constitution*. I find it judicious to therefore depart from the principle. I shall therefore not award costs but rather direct each party to bear their costs. In doing so, I find guidance from the case of *Jasbir Singh Rai & Others vs. Tarlochan Rai & Others* Pet. No. 628, 630 of 2014 (2015) eKLR where the court observed that: -

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”

76. In the premise, the Application dated 4th April, 2022 is hereby dismissed. The Petition dated 4th April, 2022 is struck out.

Orders accordingly

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 25TH DAY OF MAY, 2023

.....

R. LAGAT-KORIR

JUDGE**

Ruling delivered in the absence of the parties. Court Assistant (Siele)

