



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 556 OF 2012

JEFFER ISAAK KANU.....PETITIONER

VERSUS

MINISTRY OF JUSTICE, NATIONAL COHESION

AND CONSTITUTIONAL AFFAIRS.....1ST RESPONDENT

**THE INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION.....2ND RESPONDENT**

**COMMISSION FOR THE IMPLEMENTATION OF
THE CONSTITUTION (CIOC).....3RD RESPONDENT**

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Introduction

1. This matter concerns the issue whether Kenyans living in the diaspora can exercise their right to vote in the elections slated for March, 2013. The Petitioner is a Kenyan citizen by birth residing in the United Kingdom, having relocated there for business purposes more than a decade ago. He brings this Petition challenging the decision by the Respondents not to provide for registration and subsequent voting of Kenyans, such as himself who live in the diaspora. He argues that the exclusion was unconstitutional as it deprived them of their political rights protected by **Article 38** of the Constitution.

2. The Petitioner also takes issue with the fact that the Independent Electoral and Boundaries Commission (“the IEBC”) has earmarked certain stations in the East African region where Kenyans can register and vote in the forthcoming General Elections and laments that such a move is discriminatory in as far as it does not apply to all Kenyans living in other parts of the world, the United Kingdom included.

3. In the Petition filed on 3rd December, 2012 supported by the Petitioner’s Affidavit, the Petitioner seeks the following Orders;

1. A declaration that the 2nd Respondents by their actions and inactions which purport to exclude persons from the Diaspora from exercising the right to vote as enshrined in the Constitution is in breach of the Petitioner’s Political rights(in common with those of persons in the Diaspora) spelt out under Article 38 of the Constitution, thus unconstitutional, null and void.

II. *A declaration that the Petitioner's right to freely exercise the right to vote and to participate in a democratic, free, regular and fair election can only be properly realized and achieved once the 2nd Respondents registers persons in the Diaspora as voters.*

III. *A declaration that by purporting to exclude the Petitioner herein, and persons living in the Diaspora from exercising their right to participate in the democratic free and fair elections in the March 4th 2013 General elections while on the other hand allowing a selected few to be registered as voters is discriminatory as against the Petitioner and other persons living in the Diaspora on account of their social status and origin, in violation of Article 27 of the Constitution thus unconstitutional, null and void.*

IV. *A declaration that unless and until the persons in the Diaspora are registered as voters and ultimately exercise the right to vote during the forthcoming General elections, the General Elections scheduled for 4th March 2013 be suspended.*

V. *A declaration that by purporting to exclude the Petitioner herein, and persons living in the diaspora from exercising their right to participate in the democratic free and fair elections in the March 4th General Elections, the 2nd Respondents are in breach of the aspirations of the people of Kenya, their sovereign power as reserved under Article 1 of the Constitution and the National values and principles of governance set out under Article 10 of the Constitution.*

VI. *A declaration that the 2nd Respondent, in purporting to execute the whims and directives of the Executive through the 3rd Respondent and the decision of the Cabinet to exclude persons from the Diaspora from exercising the right to vote in the forthcoming General Elections on flimsy grounds violates the Constitutional provisions that Commissions and Independent Offices established under the Constitution shall be independent and not subject to the control of any other authority as set out under Article 249 of the Constitution, thus unconstitutional, null and void.*

VII. *A declaration to issue directing the 2nd Respondents to exercise their statutory and Constitutional duty and to forthwith undertake voter Registration of persons in the Diaspora with immediate effect so as to allow persons in the Diaspora to participate in the forthcoming General Elections.*

VIII. *An order of mandamus to issue compelling the 2nd Respondent to forthwith commence registration of persons in the Diaspora in accordance with the letter and spirit of the Constitution and to enable persons living in the diaspora to exercise their right to vote during the forthcoming general elections.*

The Petitioner's Case

4. The Petitioner's case is set out in the Petition filed on 3rd December, 2012 and the Petitioner's Affidavit in support of the Petition and written submissions dated the 13th December, 2012. I have partly set out the gist of his case above and in addition, the Petitioner's case is hinged on the fact that in promulgating the Constitution, and in particular **Article 82** of the Constitution, Kenyans expressed their aspirations that persons in the Diaspora should be allowed to exercise the power of the vote in the mother country, while living outside it.

5. The Petitioner's grievances stems from remarks in the Press attributed to the Minister for Justice, National Cohesion and Constitutional Affairs who allegedly stated that persons in the diaspora will not participate in the voting process come March 2013 due to logistical and time constraints. That subsequently on the 1st December, 2012, the IEBC held a press conference confirming that indeed persons in the Diaspora will not be registered as voters and will ultimately not vote in the forthcoming General Elections. The Petitioner contends that these related actions demonstrated that the IEBC acted at the whims of the Executive, contrary to the constitutional guarantees on independence of all the Commissions created by the Constitution, IEBC being one of them.

6. It is the Petitioner's contention that the Chairman of IEBC is on record as having promised to deliver free, fair and credible elections where people in the Diaspora will participate in the voting process by designating Kenyan Embassies and consulates abroad and as probable registration centres thus conferring a legitimate expectation that they will indeed vote in the General Elections.

7. It is the Petitioner's case that Kenyans in the Diaspora being citizens also have a right, without unreasonable restrictions, to be registered as voters and to participate in the voting process by secret ballot and that proper mechanisms to cater for their interests as contemplated under Article **82(1)(d)** of the **Constitution** must be put in place.

8. The Petitioner further contends that his rights and those of other Kenyans living in the Diaspora encapsulated under **Article 38** of the **Constitution** will be violated if persons living in the diaspora are barred from being registered as voters. He also believes that the principles of democracy and good governance enunciated under **Article 10** will be trampled upon should they be barred from being registered as voters.

Dr. John Khaminwa, Advocate, representing the Petitioner also submitted that non-implementation of the Constitution was a matter that could not be hampered or handicapped because of lack of resources and argued that the mechanism used to register Kenyans in the East African region could be replicated in other countries in the world.

He further submitted that the decision in **New Vision Kenya (Nvk Mageusi) & 3 Others vs Independent Electoral and Boundaries Commission & 4 Others, Nairobi H. C. Constitutional Petition No.331 of 2012**, in which the Court upheld that the rights were to be achieved progressively, was not binding on this Court and urged the Court to depart from it and grant the orders sought.

9. The Petitioner also made the point that by excluding over 3 million persons in the diaspora from the political process in their mother country, the IEBC has relegated them to second class citizens thus discriminating them contrary to **Article 27** of the **Constitution**.

The Petitioner discounted the IEBC's allegations that it lacked adequate funding to conduct the diaspora voting by arguing that the IEBC has received enough funding from the Treasury and also donor support for the exercise. Dr. Khaminwa submitted on this point that the IEBC had resources and time to do this as the Embassies and Chanceries could be used for the registration and voting exercise and that therefore, no resources were required for setting up registration centres. He urged the Court to send a powerful message to the IEBC and the Executive by granting the orders sought in the Petition.

The Respondents' Case

10. The IEBC strongly opposed the Petition and did so by filing a Replying Affidavit on 13th December, 2012 sworn by Mahamud Mohamed Jabane, the Manager, Legal Services with the IEBC, the 2nd Respondent.

11. The IEBC firstly points out that the matter is an abuse of the Court process, the same issue having been raised and determined by this Court in **Petition No. 556 of 2012** aforesaid. It was therefore the IEBC's case that the matter was *res judicata* in as far as the High Court jurisdiction is concerned and that the present Petition was meant to vex the Respondent and undermine the progress towards having the scheduled elections in March, 2013.

12. On the substance of the Petition, the IEBC has taken the position that the right in issue is not instantaneous but that it was one to be progressively achieved as stipulated in **Article 82(1)(e)** of the Constitution. It is also the IEBC's case that the Constitution envisages that the right of Kenyans in the diaspora to be registered as voters and participate in elections cannot finally be achieved at once or in a short period and that as part of its progressive efforts, the IEBC is registering only Kenyans in the East African region due to the logistical and financial limitations that it is currently facing.

13. Mr. Nyamodi, learned advocate representing IEBC, submitted that the Petition was premised on a misunderstanding of the right to Kenyans resident outside Kenya to vote for elections under **Article 82(1)(e)** arguing that the words 'progressive' and 'progressively' were the operative words in any discussion on the subject and contended that in **Article 38** of the **Constitution**, the general right to vote was not absolute but subject to 'reasonable restrictions'. Mr. Nyamodi therefore concluded that the right by the Kenyan diaspora to vote was not an immediate right to be enjoyed from the date of Promulgation of the Constitution and he urged the Court to take into account practical considerations in determining how and when the right should be enjoyed.

14. Regarding the Petitioner's contention that the Commission's independence was compromised by the Executive regarding the diaspora vote, the IEBC invoked its independence stating that the Executive/Cabinet lacked the mandate to make any decision as regards participation of the Kenyans living in the diaspora and Mr. Nyamodi submitted that the Commission had no independent source of funds but relied on the Government for the same and that with the Kshs.17 Billion allocated to it for 2012/2013 Financial year, it could only register voters in the East African Region and not the whole world as contended by the Applicant.

15. Mr. Nyamodi further submitted that Parliament was obligated to enact legislation regarding the registration of voters residing abroad and that in the year 2011, the Elections Act, 2011 was enacted and Section 109 thereof mandated the IEBC to make regulations for *inter alia* the progressive registration of voters residing outside the territorial waters of Kenya. That the IEBC then came up with the ***Elections (Kenyan Citizens Residing Outside Kenya)(Registration and Voting) Regulations, 2012*** and through Gazette Notice number 19401 dated 14th December, 2012, the IEBC gazetted the Registration Centres in the East African countries and he called on the Court to assess what Parliament and the IEBC had done in efforts towards the progressive realisation of the right to vote and argued that the Petition ought to be dismissed.

16. Mr. Opondo, learned State Counsel, representing the Attorney General and the Minister for Justice adopted Mr. Nyamodi's submissions in toto. The 3rd Respondent did not participate in the proceedings.

Determination

17. The word 'progressive' stems from the word "progress," which, according to the ***Concise Oxford English Dictionary*** is "a gradual movement or development towards a destination." Progressive realization, therefore, connotes a "phased-out attainment of an identified goal." (See Supreme Court Advisory Opinion No. 2/2012). This definition is important for reasons to be seen shortly and I deliberately began by raising the issue at this stage of the judgment.

The Right to Vote

18. **Article 38** of the **Constitution** which secures political rights at the relevant part provides thus:

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; -or

(b) any office of any political party of which the citizen is a member.

(3) 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. (Empasis mine)

The right to vote is also a well-established norm of international law. Significant international treaties, including the International Covenant on Civil and Political Rights (ICCPR) and regional agreements enshrine citizens' claims to universal and equal suffrage. The enshrinement of the right in a Constitution to vote not only puts a bulwark against any government action that infringes on that right but also necessarily places a positive obligation on the State to ensure that its citizens vote voluntarily. As the South African Constitutional Court observed in the case of **Richter v Minister for Home Affairs & 2 others(supra) [2009] ZACC 3**, *“Unlike many other civil and political guarantees, as this Court has remarked on previous occasions, the right to vote imposes an obligation upon the state not merely to refrain from interfering with the exercise of the right, but to take positive steps to ensure that it can be exercised.”*

19. The preamble to the Constitution also recognizes the *“aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”* and the right to vote is necessarily embedded in that rallying call.

20. In the South African case of **August and Another v. Electoral Commission and Others** the Constitutional Court (Sachs J) underlined the importance of the right to vote in the following terms:

“[u]niversal adult suffrage on a common voter roll is one of the foundational values of our entire constitutional order...The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”

21. The South African Constitutional Court in that case rejected the argument that allowing prisoners to vote posed special hardships on the electoral commission. The Commission's intention to make no effort to allow prisoners to vote was thus found to have amounted to an unconstitutional deprivation of their right to vote. I am certain that our Courts will in due course make a determinate finding on the same issue but I digress.

22. In **Sauve v. Canada 158 C.C.C. (3d) 449; 2002**theSupreme Court of Canada expressed the same principle in the following terms:

“[t]he right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizen, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.”

23. Further, in the case of **Richter v Minister for Home Affairs & 2 others(supra) [2009] ZACC 3**, in holding that some sections of the Electoral Act that did not allow for all South African citizens who were registered voters and living and working abroad to vote in elections, were inconsistent with the Constitution and therefore invalid, the Constitutional Court of South Africa observed in part as follows:

“The right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues, ...democracy itself will be imperilled. Each vote strengthens and invigorates our democracy. In marking their ballots, citizens remind those elected that their position is based on the will of the people and will remain subject to that will. The moment of voting reminds us that both electors and the elected bear civic responsibilities arising out of our democratic Constitution and its values. We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to

vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.”

24. I am in complete sympathy with the above erudite words and regarding the role of the Kenyan diaspora and their contribution to the socio- economic affairs of the Nation, there is no doubt that the same is immense but it has no influence at all on rights that they have as citizens. This is why in the Ritcher case (supra), Justice O'Regan rightly remarked as follows;

“I am influenced by the fact that, as several of the parties noted, we now live in a global economy which provides opportunities to South African citizens and citizens from other countries to study and work in countries other than their own. The experience that they gain will enrich our society when they return, and will no doubt enrich, too, a sense of a shared global citizenship. The evidence before us, too, shows that many South African citizens abroad make remittances to family members in South Africa while they are abroad, or save money to buy a house. To the extent that citizens engaged in such pursuits want to take the trouble to participate in elections while abroad, it is an expression both of their continued commitment to our country and their civic-mindedness from which our democracy will benefit.”

Again, I wholly agree with these expressions as they apply solidly to the Kenyan diaspora and to the issues raised in the Petition.

IEBC’S Responsibility

25. **Article 88** of the Constitution establishes the IEBC with the responsibility of ‘conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other election 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;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- ((k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.”

26. Among the principles of the electoral system under **Article 82(1)** are the ‘freedom of citizens to exercise their political rights under **Article 38**’ and ‘universal suffrage based on the aspiration for fair representation and equality of vote’.

27. As was held in the *Ritcher Case* (above) at Para. 55:

“In designing and establishing an electoral system, one of the crucial considerations is the need to foster enfranchisement. The electoral system should recognise that the right to vote has both symbolic and democratic value and that wherever possible the participation of citizens should be encouraged. There are of course other important constitutional considerations relevant to the design of an electoral system. Amongst them is the need to ensure that the election process will be free and fair^[1] and that the results will be both credible and accurate. (Empasis added)

IEBC has argued that it has acted within its mandate as regards the diaspora's right to vote and has now provided regulations for the registration of diaspora votes. I.e. The Elections (*Registration of voters*) Regulations, 2012 (Legal Notice 126 of 2012) which at Part VIII provides for the registration of Kenyans residing abroad.

The above fact has not been controverted.

Parliament's Role

28. Under **Article 1** of our Constitution, sovereign power belongs to the People of Kenya and may be exercised either directly or through their democratically elected representatives. That sovereign power is delegated to various state organs, Parliament being one of them and composed of democratically elected representatives as stipulated by **Article 94** of the Constitution.

29. **Article 82(1)** obligates Parliament to enact legislation to provide for various matters including the;

(a) *the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;*

(b) *the nomination of candidates;*

(c) *the continuous registration of citizens as voters;*

(d) *the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and*

(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote. (Empasis added)

30. Pursuant to the Article, Parliament enacted the **Elections Act, No. 24 of 2011** which at its **Section 109** mandates the IEBC to make regulations to among other things, ‘*Prescribe the procedure for registration and issuance of voters’ cards and for the progressive registration of Kenyan citizens abroad*’ and ‘*prescribe the procedure for voting for citizens residing outside Kenya.*’

Section 4 of the Act also provides for a Principal Register of voters which is to comprise among other things a ‘*register of voters residing abroad.*’

31. The South African Constitutional Court in **New National Party of South Africa v Government of the Republic of South Africa and Others [1999] ZACC 5; 1999 (3) SA 191 (CC)**; regarding the role of Parliament, observed thus;

“Parliament is obliged to provide for the machinery, mechanism or process that is reasonably capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so...”

The same principle applies squarely to the Kenyan Parliament and particularly with regard to the rights of citizens abroad who wish to vote.

The Principle of Progressive realisation

32. **Article 82(1)(e)** obligates Parliament to enact legislation to provide for the progressive realisation of their right to vote. **Section 109(1) (b)** of the **Elections Act** uses the same term 'progressive' and thereby mandates the IEBC to make rules to among other things to 'prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad'.

33. The issue of progressive realisation has been the subject of consideration in various Court cases in our jurisdiction. The case of Republic vs Independent Electoral and Boundaries Commission and another ex-parte Councillor Eliot Lidubwi Kihusa & 5 Others, JR Misc.Appl. No.94 of 2012 is one of them. In that case, the Court, held that the constitutional provision that required the electoral body to progressively work towards attainment of the population quota under **Article 89(7)(a)** of the **Constitution** of Kenya, 2010 did not mean 'instant' achievement of the quota and stated further as follows; “[para 169] ***Our view is that indeed a wholesome reading of the aforementioned provisions point to the fact that the attainment of a relatively equal composition in terms of population quota can only be realised progressively and not instantly.***”

34. Most recently, the Supreme Court of Kenya in the **The Matter of Attorney General, supreme Court Constitutional Application No.21 of 2012** in rendering its Advisory opinion whether **Article 81(b)** as read with other provisions of the Constitution requires a progressive realisation of the one-third gender rule, or requires the same to be implemented during the General Elections of 2013, by a majority, (with Mutunga, CJ, dissenting) observed as follows;

“[53] We believe that the expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The Exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action...

[59] whether a right is to be realized “progressively” or “immediately” is not a self-evident question: it depends on factors such as the language used in the normative safeguard, or in the expression of principle; it depends on the mechanisms provided for attainment of gender-equity; it depends on the nature of the right in question; it depends on the mode of constitution of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the players who introduce the candidates for appointment or election; it depends on the manner of presenting candidature for election or nomination.”

35. At the International level, **Article 2** of the **International Covenant on Economic Social and Cultural Rights (ICESCR)** imposes a duty on all parties to;

“take steps .. to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”

The right to vote falls within the purview of the Article and specifically within the context of the instant case.

36. Further, in its **General Comment Number 3, The Nature of States Parties Obligations** (Art. 2, Para. 1 of the Covenant), adopted by the UN Committee on Economic, Social and Cultural Rights at its fifth session, 1990, UN Doc. HRI/Gen/1/Rev.3, 15 August 1997 the UN Committee maintains "that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. It is stated thus in that regard; ***“In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at***

its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. The Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."

The comment above is of course significant because of the "lack of resources argument" advanced by IEBC.

37. Closer home, in the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another, Petition No. 102 of 2011**, Court opined thus;

"The Government must ensure that the National and County Governments have laws, policies, programmes and strategies that are adequate to meet its obligation under Article 27. The measures must establish coherent programmes towards the progressive and the immediate realization of all the rights within the State's available means. The programmes and the legislations must be capable of facilitating the realization of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive, not for the courts. We think the measures they adopt must be reasonable, practicable and they must be able to address the long term and the short term needs of the vulnerable groups of our society."

38. The common argument as seen above is that the measures taken by the State must be reasonable. In the South African Constitutional Court case of **Government of the Republic of South Africa v Grootboom 2001(1) SA 46(CC)** regarding the State's responsibility on provision of socio-economic rights the Court rendered itself thus;

"A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met."

39. In the present case, Parliament and IEBC have promulgated the Laws and Regulations as required under the Constitution and the Electoral Laws. As the Supreme Court noted in its decision above, even the requirement for enactment of legislation is not an order that can be achieved on command because it may often require a process including consultation of stakeholders and the public; The Court stated thus in that regard; *"We take judicial notice that the passage of legislation ["legislative measures"] to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command; it is inherently, a process and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the constitution, the development of legislation is no longer the preserve of parliament, or the legal draftspersons in the State Law Office; public participation in the legislative process is a constitutional imperative"*

40. The question would then be, having enacted legislation and regulations is Parliament and the IEBC absolved of all blame? Is their task done? In answering a similar question in the **Grootboom case** (above), the Court opined that mere legislative measures by themselves are inadequate in the absence of clear cut policies on their implementation and the relevant bodies must work towards ensuring that the legislative words are operational. At Para. 42 of the Court's decision it is stated as follows;

"The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have

to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations"

I wholly agree with the above findings.

41. In the present case, the IEBC is guilty of an act whose end it may not have entirely foreseen; members of the Commission travelled far and wide in the diaspora and made a firm promise in the following words; *"you shall vote in the next General Election"*. It reneged on that promise and deflated the expectations of the diaspora, hence this and other cases to enforce the right to vote.

Are the reasons given for reneging on the promise justifiable and can they pass the reasonability test set out above? To the extent that the right to vote by the diaspora is only one of the few instances in the Constitution where a right is to be realised progressively and not instantly, then it can be said that they have done something in the circumstances. I say this because the March, 2013 General Election is the first under the Constitution, 2010. IEBC has set in place the legal mechanism for the exercise of the right and has actualised it by registering voters in the East African Region. That is commendable and Parliament has also done its bit.

Having so said, I am unconvinced that the *"logistics"* and *"lack of resources"* argument has been advanced to an agreeable level and to meet the test of the Constitution. When the promise was made to the diaspora, IEBC was aware of those issues but still made the firm promise to them.

I say so, with respect, because in his Affidavit sworn on 13th December 2012, Mohammed Jabane has merely stated that the logistical challenges include staff, equipment, premises and finances but says nothing more. It cannot, in a matter involving rights, be a sound argument to raise issues casually and without supporting evidence. I have many questions to ask in that regard but suffice it to say that I agree with the position taken by the United Nations elsewhere stated above that the State and all its organs, the IEBC included must *"demonstrate that every effort has been made ... to satisfy those minimum obligations."* I also agree with Dr. Khaminwa that when the State raises the *"lack of resources"* argument to deny a right, the stage is set for a very dangerous and frightful future for the citizenry. Rights, once subordinated to that position will easily be curtailed and lack of resources cited as the reason for curtailment. I do not subscribe to such an argument, generally.

Having so said, I am conscious of two factors that must be taken into account in a situation such as the one the diaspora and the country now finds itself in. 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. He is disappointed and rightly so and he is asking this Court to stop the General Elections until he and others are immediately registered as voters. I disagree and for obvious reasons. The right exists and has not been taken away save by the Constitution itself and it can be realised in my view as soon as the next General Election after the March 2013 one and I hope the IEBC has taken a cue from my sentiments above and work out a comprehensive programme towards a total realisation of the right by the diaspora to vote in that Election. Only then can we say that our democracy has come of age.

Secondly, to reopen the registration exercise will only lead to confusion that is unnecessary in the context of our shared history. Only five years ago, a discredited electoral body was unable to deliver credible election results and the country burnt. It is less than 60 days to the next election and any further delay in the preparation thereof would only lead to a frustration that may implode the Nation. The IEBC needs time to set the stage for a credible election and any set-backs will not assist it in that regard

Conclusion

42. In the circumstances, my finding would be that this is not the situation in which the Court can intervene by way of the orders sought. The Law provides for the enactment of Law to provide for the 'progressive realization' of the rights for the Kenyans living in the diaspora to vote and the legal framework is now in place. As seen above, this connotes 'gradual' realization of the right and it is clear that the right has not yet crystallized in the absence of concrete measures to realize it. The Court is also wary of immersing itself into the pool of policy making in the absence of clear constitutional or statutory violations. I have in making that finding found fault in the conduct of IEBC which can be remedied in due course.

43. I also concur with the holding of my learned brother Majanja J. in **New Vision Kenya (Nvk Mageuzi) & 3 Others vs Independent Electoral and Boundaries Commission & 4 Others (supra)**, that *“Voting does not occur in a vacuum, there must be a legal and administrative framework hence the establishment of the IEBC whose core mandate is to secure the right to vote and implement it in line with legislation passed in accordance with Article 82 ...*

[41]Absent any violation of the provisions of the Elections Act and the Elections (Kenya Citizens Residing outside Kenya) (Registration and voting) Regulations, 2012 giving effect to the right to vote for Kenyans residing abroad, the IEBC is entitled to act in accordance with these regulations.”

I see no concrete reason for departing from that decision inspite of my misgivings expressed elsewhere above.

44. That notwithstanding, the Government and IEBC must be told that they need to put in place efficient, concrete and realistic mechanisms including fiscal and logistical measures to ensure that all citizens living abroad take part in the General Election following the March, 2013 Elections. All available means to realise these rights, must be used and all resources applied towards that end, otherwise the right to universal suffrage will merely become a pipe dream and wrongly relegated to aspirations or “luxuries“, so to speak for Kenyans who popularly endorsed the Constitution, 2010. If I may adopt the words of the Attorney General of India as cited in **S Rajab-Budlender & N Budlender's Judges in conversation: Landmark human rights cases of the twentieth century (2009);**

“Once you have [justiciable] socio-economic rights in the Constitution and the Bill of Rights, I think it is too late to say that these are mere aspirations that cannot be enforced. Otherwise you are saying that the founders of the Constitution played a hoax on the people. Because they are in the Constitution, they are pledges to the people-so you cannot say the difficulties of enforcement or impracticability should mean that judges say that it is too difficult”

45. I agree and without saying more and much as I completely sympathise with the Applicant and Kenyans in the diaspora, the circumstances obtaining at the moment and the Law as I have expressed above, would not allow me to accede to his plea. Instead, I will dismiss the Petition with no orders as to costs.

46. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Coram: Irene – Court clerk

Dr. Khaminwa for petitioner

Mr. Okonyo holding brief for Mr. Nyamodi for Respondent

Mr. Opondo for Attorney General

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

Further Order

Copies of the judgment to be given to parties.

ISAAC LENAOLA

JUDGE