



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 331 OF 2012

BETWEEN

NEW VISION KENYA (NVK MAGEUZI).....1ST PETITIONER

KENYA DIASPORA ALLIANCE2ND PETITIONER

SHEM ODONGO OCHUODHO3RD PETITIONER

MR GICHANE MURAGURI4TH PETITIONER

AND

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION & 4 OTHERS.....1ST RESPONDENT

MINISTER FOR STATE FOR IMMIGRATION

AND REGISTRATION OF PERSONS.....2ND RESPONDENT

MINISTER FOR FOREIGN AFFAIRS

AND INTERNATIONAL CO-OPERATION.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE MINISTER FOR JUSTICE, NATIONAL COHESION

& CONSTITUTIONAL AFFAIRS.....5TH RESPONDENT

THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....INTERESTED PARTY

JUDGMENT

1. This case concerns the right to vote for Kenyan citizens living outside the country. It is estimated that there are about 3 million Kenyans who live outside the country. These citizens contribute to the socio-economic development of the country. According to the **World Bank, Migrations and Remittance Factbook, 2012**, it is estimated that they contribute about USD 1.8 Million annually which accounts for 5.4% of GDP.
2. The petitioners in their own right and on behalf of other citizens of Kenyans living abroad present this petition in order to seek the following reliefs from the court;
 - a. *A declaration that Kenyan citizens in the Diaspora possess a fundamental and inalienable right to be registered as voters and to vote and/or seek elective office pursuant to Article 38(3)(a) and (b) of the Constitution of Kenya.*
 - b. *A declaration that the failure by the Respondents to provide the Diaspora with the opportunity to register and vote is a violation to the fundamental rights of Kenyans in the Diaspora to vote thereby contravening Article 82(1)(c) and of the Constitution which provides for the progressive registration of citizens residing outside Kenya and the progressive realisation of their right to vote.*
 - c. *A declaration the Kenyan citizens in the Diaspora who are dual citizens need not register as Kenyan citizens and are eligible to be registered, vote and participate in the general elections.*
 - d. *An order that the Respondents adequately provide for voter registration and satisfactory voting mechanism for Kenyans living in the Diaspora, not just for presidential but also for other posts as well.*
 - e. *That this Honourable court orders the 1st Respondent to declare and set up more polling centres over and above Embassies and Consulates, and deploy Independent Electoral and Boundaries Commission Officials as Returning officers, or collaborate with host Electoral bodies to provide similar service.*
 - f. *That this Honourable Court orders the 1st Respondent to where tenable to give priority and preference to, and accordingly make provisions for secure electronic voting, through online systems and/or mobile phone-based text facility.*
 - g. *An order that the Respondents jointly and severally put in place infrastructure to allow for maximum number of Kenyans in the Diaspora to register as voters and participate in the general elections on a cost-effective basis either by electronic voting or otherwise*
 - h. *Costs of this Petition.*
 - i. *Any further Relief or Orders that this Honourable Court shall deem just and fit to grant.*
3. The petition is supported by the affidavits sworn by Dr Shem Ochuodho, the 3rd petitioner and trustee of the Kenya Community Abroad, who is a resident of Juba, Southern Sudan and one of Gichane Muraguri, the 4th petitioner and trustee of Kenya Community Abroad.
4. The central complaint is that the Independent Electoral and Boundaries Commission (IEBC) established under the Constitution and the **Independent Electoral and Boundaries Commission Act** in its planning for the general elections scheduled for the year 2013 overlooked the provisions for registration and participation of Kenya citizens in the diaspora in the forthcoming elections.
5. The petitioners fear that if voter registration for persons outside Kenya is not conducted then they will lose their right to vote in the forthcoming elections. They contend that their efforts to engage the IEBC to deal with the concern of voters in the diaspora have not been fruitful and it is likely that their fundamental rights and freedoms will be violated.
6. The petitioner's case is founded on the right to vote which is protected by **Article 38** of the Constitution. **Article 38** sets out political rights as follows;

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party;

or

(c) to campaign for a political party or cause.

(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.

7. **Chapter Seven** of the Constitution titled, “**Representation of the People**” gives practical effect to the right to vote. **Article 81** sets out the general principles that govern the electoral system. These principles include the freedom of citizens to exercise their political rights under **Article 38**, universal suffrage based on the aspiration for fair representation and equality of the vote as free and fair elections, which are *inter alia*, administered in an impartial, neutral, efficient, accurate and accountable manner.
8. **Article 82(1)(e)** empowers Parliament to enact legislation to provide for, *inter alia* the progressive registration of citizens residing outside Kenya, and the progressive realization of their right to vote. **Article 83** provides the qualification for registration as a voter. It provides that a person qualifies for registration as a voter if the person is an adult citizen, is not declared of unsound mind and has not been convicted of an election offence during the preceding five years. **Article 83(3)** sets the parameters for the IEBC in registration of voters. It provides, “**Administrative arrangements for the registration of voters as the conduct of elections shall be designed to facilitate and shall not deny an eligible citizen to vote or stand for election.**”
9. Hon. Muite, S.C., counsel for the petitioners, informed the court that the petitioners, did not wish to pursue relief in respect of their right to contest the elections and in the circumstances would only pursue their claim in so far as it dealt with the right to vote of citizens resident outside Kenya to vote in the elections. I shall therefore limit this judgment to matters which were subject of the oral submissions by the parties and in particular limited to the provisions relating to the right to vote.
10. Hon. Muite submitted that all the provisions of the Constitution cited starting from **Article 38** which guarantees the right to vote and the obligations imposed on the IEBC must be read in a manner that fulfils the fundamental right of every citizen to vote. Counsel stated that **Articles 82 and 83** must be harmonised in a manner that to gives effect to the primary right to vote in **Article 38**
11. Counsel further submitted that the court should take into account the context in which voting takes place particularly the fact that there is available technology to ensure registration of citizens abroad. Such technology, counsel added is now cheaper, readily available and error proof. Furthermore, many countries in the world have now adopted measures to ensure that citizens in the diaspora vote and Kenya should now join this international community in making provisions for its citizens abroad to vote in order to fulfil the citizens right to vote enshrined in the Constitution.

The IEBC's Case

12. The IEBC has opposed the application on the basis of the **Replying Affidavit** sworn on 28th September, 2012 by Paraxedes Tororey, the Director, Legal and Public Affairs with the IEBC, and the written submissions filed on the 18th October, 2012. The 1st objection raised by the IEBC is that the petition does not raise any justiciable matter. That it is speculative and premature as the IEBC is taking steps within the law to register voters in the diaspora.
13. Ms Osoro, counsel for the IEBC, submitted that ***The Elections (Kenya Citizens residing outside Kenya) (Registration and Voting) Regulations, 2012*** make provision for registration of Kenyan citizens outside Kenya. According to the Regulations, the IEBC shall at regular intervals publish the names of countries in which registration and voting is scheduled to take place. Under **Regulation 6(2)(a)**, the decision by the IEBC to register Kenya citizens residing outside Kenya or to conduct elections outside Kenya shall be based on logistical considerations or any other criteria that the Commission may determine.
14. The IEBC contends that these regulations meet the requirement of **Article 82(3)** that require progressive realization of the rights of the Kenya citizens outside the country. Counsel submitted that since it is the IEBC which is empowered to determine and consider on the basis of the determined criteria how and where Kenyans shall vote is a matter within the IEBC's discretion, it would be improper to interfere with the IEBC's independence enshrined in the Constitution. On the whole, Ms Osoro, contends that the ***Election (Kenya Citizens Residing Outside Kenya) (Registration and Voting) Regulations, 2012*** succinctly provide that the IEBC decision shall be based on logistical considerations or any other criteria that the Commission may determine and the granting of the declarations sought would contravene the law and interfere with its legal and constitutional mandate.
15. Ms Osoro termed the petition as 'alarmist' pointing out that the right to diaspora vote under **Article 82(1)** was not instant but was to be *progressively* realised. It was the IEBC's case that if this court were to grant the orders for instant registration of the diaspora voters, it would be in disregard to provisions of **Article 82(1)(e)** which contemplates for progressive voter registration of Kenyans living abroad. It further urged that the law does not operate in a vacuum, it allows the IEBC the time and opportunity to meet its obligations under the Constitution and the law.

The Attorney-General's Case

16. Mr Kaumba, counsel instructed by the Attorney General, opposed the application on the ground that there is no violation alleged against the 2nd, 3rd, 4th and 5th respondents and therefore there is no cause of action against these parties. Counsel further argued that this case is premature as registration of voters is yet to begin and no one has been denied registration and that in fact there is no evidence of breach of anyone's rights.
17. It is the Attorney-General's position that the mandate of the IEBC is guaranteed under **Article 249** and it is the responsible body for carrying out administrative arrangements and measures including seeking cooperation from all state organs, institutions or bodies. In this regard, Mr. Kaumba suggested such arrangements have not failed and there is no reason for the court to interfere as requested by the petitioners.

Determination and Disposition

18. I have heard submissions and considered the pleadings and written submissions and I think three issues fall for consideration:
- i. First, the nature and extent of the right to vote for Kenyan citizens residing outside the country;
 - ii. The extent of the responsibility of the IEBC to facilitate this right;
 - iii. Whether I should grant the reliefs sought.
19. Before I consider the issues I have outlined, I will deal with the threshold of whether there is a

violation or threat of violation. The respondents aver that the petition is speculative and non-justiciable in the sense that there is no threat of violating the petitioners' rights. This threshold is part of **Article 22(1)** which provides that "*Every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened.*" (Emphasis mine).

20. The question of whether there is a threat or a violation is a question to be determined in the circumstances of the case and I think in this case, the petitioner's cause of action is grounded on the apprehension that their right to vote may be violated and the question of determining whether this threat is real cannot be divorced from determination of the issues raised in the petition.
21. I do not agree with the respondents that one has to wait for registration of voters in order to file suit. It is not in doubt that the election timetable is already being implemented and it would not be in the interest of justice to wait until the bell tolls before seeking the court's relief in this instance.

The Right to Vote for Citizens Living outside of Kenya

22. The right to vote is now protected in the Constitution as a political right. The preamble to the Constitution 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.*" **Article 1** provides that all sovereign power belongs to the people of Kenya. It is clear therefore that the right to vote is essential to our democracy and it is from this background that this case must be considered.
23. As I have set out earlier in the judgment, the right to vote is dealt with in various provisions in the Constitution. **Article 38**, which is part of the Bill of Rights, protects the right as a political right, **Articles 81, 82 and 83** set out how the right to vote is to be realised and exercised within the parameters set out in the principles of election and the electoral process and system. All these provisions must be read together and given full effect. The principle of harmonisation was elucidated in the case of *Olum v Attorney General of Uganda [2002] 2 EA 508* where the Supreme Court of Uganda stated that, "*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.*"
24. The right to vote protected in **Article 38** is realized and implemented by the IEBC in accordance with the provisions of **Chapter Seven** of the Constitution. **Article 38(3)** which protects the right to vote is not absolute in its terms. The Constitution envisages that there may be certain restrictions which may be placed on the right to vote but these restrictions must be reasonable. **Article 38(3)** states that, "*Every adult citizen has the right [to vote], without unreasonable restrictions.*"
25. To determine what is reasonable one must turn to **Chapter Seven** to determine how these provisions and the right to vote is implemented. **Article 81** sets out the general principles for the electoral system which determine whether the restriction contemplated under **Article 38 (3)** is reasonable. Further, as 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**.
26. **Article 82 (1)(2)** empowers the Parliament to enact legislation for the progressive registration of citizens residing outside Kenya, and their progressive realization of the vote. This provision means that the Constitution contemplates that the right to vote for citizens residing outside Kenya is not realized instantly but progressively.
27. **Article 82(1)(2)(e)** and **Article 38** are not inconsistent as **Article 38** contemplates that restrictions on voting may be reasonable and **Article 82(1)(2)(e)** contemplates that the right of citizens

residing outside Kenya to vote is to be realized progressively.

28. Before I conclude my finding on this point, I think it is important to address the issue of voting rights in the international context. The **Articles 2(5) and (6)** of the Constitution now provide that the general principles of international law and treaties and conventions which Kenya has ratified are part of the law of Kenya. These provisions may be used to elucidate or enrich the content of rights contained in the Bill of Rights.

29. Voting is recognized as a fundamental right in international instruments. The ***International Covenant on Civil and Political Rights (ICCPR)*** in **Article 25** provides, at the relevant part as follows:

- a. *Every citizen shall also have the right and the opportunity, without any of the restrictions mentioned in Article 2 and without unreasonable restrictions.*
- b. *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the voters.*

30. The distinctions referenced in **Article 2** of the **ICCPR** are those based on “*race, colour, sex, language, religion, political and other opinion...*” The Human Rights Committee (HRC), which is the body tasked with overseeing the implementation of **ICCPR**, issued a General Comment adopted at 57th session on 12 July 1996 clarifying the right under **Article 25**. The Comment does not specifically deal with the rights of non-resident citizens. **General Comment No. 25 (U.N. Doc. CCPR/C/21/Rev. 1/Add.7)** para. 11 states that, “[if] residence requirements apply to registration [of voters], they must be reasonable.”

31. ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*** adopted by the General Assembly on 18th December, 1990 recognises the rights of migrant workers to participate in the public affairs of their countries but subject to legislation. Kenya has not ratified this convention. **Article 41** of the Convention provides;

Article 41

1. *Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.*

2. *The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.*

32. **Article 13** of the ***African Charter on Human and Peoples' Rights*** provides, “*Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.*” The ***African Charter*** does not deal with the rights of citizens living outside the country. In ***Purohit and Moore v The Gambia Communication No. 241/2001*** at para. 76, the African Commission on Human and Peoples Rights interpreted **Article 13** in light of the HRC’s General Comment 25 and held that any conditions applicable to the exercise of **Article 25** of the **ICCPR** rights should be based on objective and reasonable criteria.

33. The ***African Charter on Democracy, Elections and Governance*** was adopted in Addis Ababa on 30th January 2004 and came into force on 15th February 2008. Kenya has not ratified this Charter and although the Charter reflects Africa’s commitment to the principles of good governance and democracy, it does not specifically provide for protection of the rights of citizens outside the country to vote. **Article 12** of the ***Charter*** provides, “*State Parties undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace.*”

34. The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of Constitutions that conform to the standards of Europe's constitutional heritage studied the issue of voting rights of citizens abroad and noted in its **2006 Report on Electoral Law and Electoral Administration in Europe (Study no. 352/2005)** that, *"External voting rights, e.g. granting nationals living abroad the right to vote, are a relatively new phenomenon. Even in long-established democracies, citizens living in foreign countries were not given voting rights until the 1980s (e.g. Federal Republic of Germany, United Kingdom) or the 1990s (e.g., Canada, Japan). In the meantime, however, many emerging or new democracies in Europe have introduced legal provisions for external voting (out-of-country voting, overseas voting)."*
35. Although many countries have adopted provisions for their overseas citizens to vote in elections, the brief overview I have set out above of international law provisions demonstrates that the right to vote is not absolute and may be restricted based on reasonable criteria. Indeed, I would add, international law has not recognised a right of non-resident citizens to vote in the countries in which they hold citizenship and in the cases where such a right is recognised, it is the subject to legislation which must meet the reasonableness standard.
36. Having considered the provisions of the Constitution and international law I find and hold that the right of citizens residing outside of Kenya to vote is subject to such reasonable restrictions as are required to be enacted by the legislature to ensure the progressive registration of citizens residing outside Kenya and in general the progressive realization of the right to vote.

Realizing the right to vote for citizens

37. I have found that the right of citizens residing outside Kenya to vote is a right to be realized progressively. **"Progressive realization"** is not defined in the Constitution but is to be found in various provisions for example **Article 21(2)** which deals with implementation of fundamental rights and freedoms. In international law, this term is common in the area of Economic, Social and Cultural rights. The UN Committee on Economic, Social and Cultural Rights has defined the meaning of **"progressive realization."** In the **General Comment No. 3 on the Nature of State Parties Obligation (Art. 2 para. 1)** it stated that, *"the concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."*
38. The core obligation is to take appropriate, legal, administrative and policy measures to realise the rights protected. This requirement is to be assessed in light of the circumstances, the resources available and time. There is also the obligation not diminish the rights secured.
39. In light of the obligation to progressively realise the right of non-resident citizens to vote, Parliament is empowered to legislate to provide for registration of voters outside Kenya. The legislation required to effect the provisions of **Article 82** was required to be enacted within one year from the effective date. In accordance with **Article 261(1)** as read with the **Fifth Schedule**, Parliament enacted the **Elections Act (No. 24 of 2011)**.

40. **Part II** of the *Elections Act* titled “**Registration of Voters and Determination of Questions Concerning Registration**” deals with issues of registration of voters. These provisions reiterate the provisions of **Article 38(3)**. More particularly, the Act requires that there should be a Principal Register of Voters which should comprise, inter alia, at **section 4(1)(e)** “a register of voters residing outside Kenya.”

41. **Section 109** of the *Elections Act* empowers the IEBC to make regulations for the better carrying out of the provisions of the Act. These regulations, *inter alia*, provide for:

- i. *Prescribe the manner in which register of voters shall be compiled and the manner in which they shall be revised.*
- ii. *Prescribe the procedure for registration and issuance of voters’ cards and for the progressive registration of Kenyan citizens abroad.*

(w) *prescribe the procedure for voting for citizens residing outside Kenya;*

42. Pursuant to **Section 109** of the Act, the IEBC promulgated *the Elections (Kenya Citizens Residing outside Kenya) (Registration and Voting) Regulations, 2012*. These regulations provide a framework for the registration of citizens outside Kenya as voters. The decision on which country to register voters is grounded on logistical consideration and any other criteria that the IEBC may determine. **Regulation 6(4)** requires the IEBC to publish a notice in the Gazette setting out the criteria used to determine the countries in which registration and voting is scheduled to take place. These Regulations were laid before the National Assembly on 30th August 2012 and approved on 4th September 2012.

43. These regulations provide a framework for the progressive realisation of the rights of the Kenyan citizens living outside Kenya. The IEBC is given responsibility to implement these provisions as it has the technical expertise and competence to do so. The right to vote for persons residing abroad presents complex problems. On the one hand is the fundamental right to vote, recognised in international law and specifically protected in the Bill of Rights and the problem of implementing the modalities of the right of citizens not resident in the country to vote. This balance, as I have found is clearly recognised in the provisions of the Constitution which requires progressivity.

44. 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.

Whether the declarations sought should be granted

45. Whether or not to grant relief is dependent on whether there is a violation of a fundamental right or whether there is a breach of the Constitution. I have found no such breach or threat to the petitioners or the rights of Kenyan citizens residing abroad.

46. Prayers (d), (e), (f) and (g) require the court to order the IEBC to do what it is required by the *Elections Act* and *the Elections (Kenya Citizens Residing outside Kenya) (Registration and Voting) Regulations, 2012*. The provisions of the Regulations give discretion to the IEBC to consider logistical consideration and other criteria to be determined by the Commission and unless a wrong or violation is demonstrated by the petitioners, the court will not interfere in the work of the IEBC.

Conclusion

47. In summary, I have found that the right of citizens to vote guaranteed under **Article 38(3)** is not absolute and may be subject to reasonable restrictions. Such restrictions for citizens residing outside Kenya are that that right is progressively realised through legislation enacted by

Parliament as implemented by the IEBC. Parliament has now acted and the IEBC has promulgated the necessary regulations and is required to act in accordance with therewith.

48. Based on what I have stated above, the petition is hereby dismissed but with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 15th day of November, 2012.

D.S. MAJANJA

JUDGE

Hon. P. Muite, S.C., instructed by Kounah & Company Advocates for the Petitioners.

Ms Osoo instructed by Murugu, Rigoro & Company Advocates for the 1st respondent.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office, for the 2nd, 3rd, 4th and 5th Respondents.