



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 331 of 2012

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

**KENYA DIASPORA ALLIANCE 2ND
PETITIONER**

**SHEM ODONGO OCHUODHO 3RD
PETITIONER**

**MR GICHANE MURAGURI 4TH
PETITIONER**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 4 OTHERS1ST
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 COMMISSISON ON HUMAN RIGHTS.....
INTERESTED PARTY**

RULING

1. The petitioners have filed the Notice of Motion dated 6th December 2012 where they seek the following conservatory orders;

(1) *That the application be certified as urgent deserving priority hearing and ex parte in the first instance.*

(2) *That this Honourable Court be pleased to grant conservatory orders restraining ht respondents herein either by themselves, their agents, servants and or persons acting under them and or their instructions, any state officer and or state organ from in any way publishing and or gazetting the Voters Register and or from in any way proceeding with the publication of the Voters Register pending the hearing and determination of this application interpartes and or further orders of this Honourable Court.*

(3) *That this Honourable Court be pleased to grant conservatory orders restraining the respondents herein either by themselves, their agents, servants and or persons acting under them and or their instructions, any state officer and or state organ from in any way publishing and or gazetting the Voters Register pending the hearing and determination of this application interpartes or further orders of this Honourable Court.*

(4) *That this Honourable Court be pleased to grant conservatory orders restraining the respondents herein either by themselves, their agents, servants and or persons acting under them and or their instructions, any state officer and or state organ from in any way publishing and or gazetting the Voters Register pending the hearing and determination of the intended appeal.*

(5) *That costs of this application be provided for.*

2. The application is supported by the affidavit of Gichane Muraguri, the 4th petitioner, sworn on 6th December 2012. The basis of the application is that the petitioners intend to exercise their undoubted right of appeal from the judgement I delivered on 15th November 2012. They have filed a notice of appeal evincing their intention to appeal.

3. The subject of the petition was the nature and extent of the rights of citizens in the diaspora to vote and in my judgment I held that such a right was to be realised progressively in light of the provisions of the Constitution consequently I dismissed the petition.

4. In effect the petitioner, the application now seeks to stop the publication of the voter registration exercise which commenced on 19th November 2012. The petitioners contend that if the process is completed and the Voter Register gazetted, the intended appeal will be rendered nugatory as the petitioner will be rendered academic. The petitioners also claim that they will be excluded from voting on 4th March 2013 when the general elections take place thereby violating their fundamental rights and freedoms.

5. The 1st respondent, the Independent Electoral and Boundaries Commission, opposes this contention on the ground that the prayers sought introduce a new dimension or cause of action that was not in existence at the time of the hearing of the suit hence the intended appeal will not be rendered nugatory. According to Mr Murugu, the issue of the registration of voters and more particularly the gazettment of the Voter Register was not an issue during the hearing of the petition.

6. The grant of a conservatory order pending appeal is a practical matter of weighing factual contentions on either side. I do not think the conservatory orders sought are warranted in the circumstances as restraining the publication or gazettment of the Voters Register pending appeal would unnecessarily interfere with the rights of other Kenyans and would stop the scheduled elections and all the related activities from proceedings in the accordance with the *Elections Act, 2011*.

7. Furthermore, if my judgment was wrong and the Appellate court overturns my decision, the petitioners will benefit from any orders that may be granted by the Court without interfering with the on-going process which concerns all Kenyans.

8. The application is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 10th day of December 2012.

D.S. MAJANJA
JUDGE

Mr Kounah instructed by Kounah & Company Advocates for the petitioners.

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