REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. E069 OF 2020

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

CABINET SECRETARY FOR STATE FOR IMMIGRATION &

REGISTRATION OF PERSONS.....2ND RESPONDENT

CABINET SECRETARY FOR FOREIGN AFFAIRS &

INTERNATIONAL COOPERATION……..3RD RESPONDENT

THE ATTORNEY GENERAL……..……..……4TH RESPONDENT

SPEAKER NATIONAL ASSEMBLY…….……..……5TH RESPONDENT

SPEAKER THE SENATE…….……6TH RESPONDENT

GOVERNOR CENTRAL BANK OF KENYA……7TH RESPONDENT

***ex parte:* JAMES GITAU**

JUDGMENT

The application before court is a motion by the ex parte applicant dated 10 December 2020. It has been filed under Order 53 Rule 3(1) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Cap. 26 Laws of Kenya.

The prayers in the motion have been framed as follows:

> *“*
>
> 1. ***An Order of Prohibition to restrain the Chairperson of the IEBC by himself, his agents, servants or otherwise howsoever from receiving the partially collected signatures that do not include the voters from the Diaspora.***
>
> 2. ***An Order of Prohibition to restrain the Chairperson of the IEBC (the 1st Respondent) by himself, his agents, servants or otherwise howsoever from commencing any verification of the partially collected signatures until it complies with Court orders and avails the opportunity for voter registration of the Diaspora including the applicants in Dallas Fort Worth before holding any referendum or General Elections.***

3. ***An Order of Prohibition to restrain the 1st respondent from holding any referenda and General Elections until it complies with the 6 and 5-years old Court Orders from Court of Appeal and the Supreme Court.***

4. ***An Order of Mandamus to compel both Speakers of National Assembly and The Senate to confirm to the Court and public the receipt of the periodic reports annually of Diaspora Voter registrations from IEBC as contained in the Supreme Court Orders,***

5. ***An order that the costs of this application be provided for."***

The motion is based on a statement of facts dated 7 December 2020 verified by the applicant's own affidavit sworn on 3 December 2020.

According to the statement, the applicant is among Kenyans who are also eligible voters living in different parts of the world. The applicant himself resides in the United States of America.

Over the years, these Kenyans in the foreign land have agitated for their voting rights and in one particular instance they moved to court for affirmation of these rights. This was in **Constitutional Petition No. 331 of 2012** filed in this Honourable Court. The petitioners in that suit were named as New Vision Kenya also known as NVK Mageuzi, Kenya Diaspora Alliance, Dr. Shem Ochuodho and Mr. Gichane Muraguri. The respondents were Independent Electoral & Boundaries Commission (IEBC); Minister for State for Immigration & Registration of Persons; Minister for Foreign Affairs & International Co-operation; Minister for Justice, national Cohesion & Constitutional Affairs and the Attorney General.

In a judgment delivered by Majanja, J. on 15 November 2012, the petition was dismissed. According to that judgment, the petitioners had sought for the following orders:

"

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."

The petitioners appealed against the decision of this Honourable Court to the Court of Appeal, in Civil Appeal No. 350 of 2012 which is reported as **New Vision Kenya (Nvk Mageuzi) & 3 Others V Independent Electoral & Boundaries Commission & 5 Others (2014) EKLR.** The appeal was determined in June 2014 and while partially allowing the Appeal, the Court of Appeal ordered as follows:

"

1. Considering that the right to vote is to be enjoyed without distinction Kenyan citizens in the Diaspora who are dual citizens are eligible to be registered as voters.

2. That the first respondent should progressively set up more registration centers in the Diaspora.

3. An order be and is hereby made directing that the respondents to adequately provide for progressive voter registration for Kenyans living in the Diaspora for all elective positions.

4. That the respondents do jointly and severally put in place infrastructure to allow for maximum number of Kenyans possible in the Diaspora to register as voters in order to facilitate them to participate in the forthcoming general elections on a cost effective basis."

The Independent Electoral and Boundaries Commission was dissatisfied with the judgment of the Court of Appeal and so it escalated the matter to the Supreme Court in **Independent Electoral & Boundaries Commission V New Vision Kenya (Nvk Mageuzi) & 4 others (2015) eKLR**. In the judgment delivered on 6 May 2015, the Supreme Court upheld the decision of the Court of Appeal but with a little variation of the orders that had been made by that Court. To be precise the Supreme Court's orders were as follows:

"[30] The foregoing analysis, and the inferences drawn from submissions and from persuasive authority, lead us to the following specific Orders:

(i) The appeal is hereby dismissed and the Judgment of the Court of Appeal delivered on 6th June, 2014 upheld subject to the following qualification to that Court's Order No. 3:

"The appellant herein shall effect a progressive voter registration for Kenyan citizens living in the Diaspora, and shall file periodic reports annually on such registration, for review by the National Assembly and the Senate, through the offices of the respective Speakers of the two Parliamentary Chambers".

(ii) The appeal is dismissed and the Judgment of the Court of Appeal of 6th June, 2014 upheld subject to the following qualification to that Court's Order No. 4:

"The appellant herein shall put in place an infrastructure for the comprehensive registration of Kenyan citizens in the Diaspora as voters, to the intent that the numbers of such Kenyan citizens participating in general elections shall increase progressively over time".

(iii) The Registrar shall serve this Judgment and its Orders upon the Speakers of the National Assembly and the Senate.

(iv) Parties shall bear their own respective costs at the High Court, the Court of Appeal, and this Court."

The applicant's case is that the IEBC has violated the orders of the Court of Appeal and the Supreme Court because it has not endeavoured to register 'millions' of Kenyans in the diaspora as voters, particularly those living in the state of Dallas, in America, where the applicant is a resident. Neither has it put in place any infrastructure to for such registration to facilitate in General Elections by many Kenyans in the diaspora.

Nonetheless, the applicant has acknowledged that in its Data Report of 2017 General Elections released in April 2020, the IEBC chairman reported that Registration of Kenyan citizens residing outside the country as voters recorded an increase from 2,637 in 2013 to 4,224 in 2017 while there were 10 polling stations outside the country, more particularly Uganda, Tanzania, Rwanda Burundi and South Africa. These, however, were not sufficient enough to comply with the orders issued by both the Supreme Court and the Court of Appeal.

In further defiance of the Supreme Court's decision the applicant alleges that the IEBC has not filed any returns with the Speakers of the Parliament on voter registration in the diaspora.

Despite the IEBC's defiance of court orders, the electoral body has approved the signatures collected for the Building Bridges Initiative (BBI) in preparation for a referendum to change the Constitution. The applicant contends the collection of signatures without any regard to the Kenyan citizens in the diaspora in disregard of the orders of the Supreme Court will certainly disenfranchise them in the anticipated referendum since they are yet to be registered as voters. It is the applicant's case that they will effectively be discriminated against if they are left out in such an important exercise as a referendum to change the Constitution.

According to the applicant, the Cabinet Secretaries in the Foreign Affairs and International Trade and Interior Ministries which houses Immigration and Citizen Services have a vital role to play by ensuring that the Kenyans in the Diaspora have current and valid passports for voter registration. It is for this reason that they have been joined in this suit.

As far as the Central Bank of Kenya is concerned, it is the applicant's case that it has been tracking remittances of Kenyans abroad for almost 16 years and releases monthly updates through the media and according to its website and that as at October 2020, the amount of US $ 263 Million had been remitted to this country.

According to the applicant, the Central Bank of Kenya has the necessary data which IEBC can use to map out regions or countries where the vast majority of Kenyans in Diaspora live and work and for this reason it has also been included in the suit.

Parliament which is made up of the Senate and the National Assembly, has the obligation to review periodic reports filed by IEBC as directed by the Supreme Court. The applicant urges that lack of review reports amounts to contravention of the Supreme Court Orders.

The applicant concludes his case by urging that the referendum on BBI and voting by Kenyan citizens abroad are matters of public interest

and therefore he has instituted this case on his behalf and on behalf of Kenyans abroad whose right to vote has been violated by the contempt of the Court Orders by the respondents.

The 1st respondent opposed the application and although a replying affidavit was filed by Michael Goa in that regard, much of the 1st respondent's contention has to do with the legal ground that the question of diaspora voter registration is *res judicata,* having been determined by the Supreme Court in the New Vision case (supra).

As far as prayers 1 and 2 of the substantive motion are concerned, it is the 1st respondent's case that they are now spent in the wake of the judgment of this Honourable Court in I**ndependent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae) (2021) eKLR**. Thus, in its submissions, the 1st respondent focused on prayers 3 and 4 of the applicant's motion.

On prayer 3, the learned counsel for the 1st respondent invoked Article 35 of the Constitution and urged that the applicant has not demonstrated that he has taken any steps to request and access the information sought in this prayer before approaching the Honourable Court. Counsel urged that the prayer was thus premature and in this regard cited the decision in **Mpuru Aburi v Meru County Public Service Board & 4 others (2021) eKLR** where this Honourable court observed that information held by the state is accessible by citizens and that it is available on request.

Further, section 4 of the Access to Information Act, 2016 provides, *inter alia,* that access to information held by a public entity or a private body shall be provided at a reasonable cost. Section 8 of that Act provides for the procedure for accessing information; it states, *inter alia,* that an application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested. There is no evidence that the applicant applied for the information sought in the prescribed manner or at all in which event, the intervention of this Honourable Court is unnecessary.

Even if the applicant can demonstrate that he had sought for the information but had been denied, then the proper cause would have been to file a constitutional petition in accordance with rules 4 and 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which specifically provide that an application for enforcement of rights under the Constitution must be by way of a Petition.

Citing the Court of Appeal decision in **Municipal Council of Mombasa v Republic & another (2002) eKLR** counsel urged that judicial review is concerned with the decision making process, not with the merits of the decision itself. Others cases cited on the same point are **Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited (2008) eKLR; Republic v Vice Chancellor (U O N) & 4 others Ex-parte Kisemei Mutisya (2018) eKLR; Republic v Secretary County Public Board & Another Ex parte Hulbai Gedi Abdille (2015) eKLR** and **Republic V Commission of Customs Services Ex parte Imperial Bank Ltd (2015) eKLR.**

As to the scope of judicial review remedies of Certiorari, Mandamus and Prohibition, counsel cited the Court of Appeal decision **in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR** in which the Court explained what each of these reliefs entail.

The prayer for mandamus cannot issue because it was stated in this case that 'where a general duty is imposed, a mandamus cannot require it to be done at once'. According to the 1st respondent, both the Court of Appeal and the Supreme Court acknowledged that the rights sought to be enforced were subject to a progressive realisation and were not to enforced at one go.

It was urged that the core obligation is to take appropriate, legal, administrative and policy measures to realise the rights protected and that the requirement has to be assessed in light of the circumstances, the resources available and time. The courts' directions were that the realisation of the right to vote by diaspora voters was progressive and this is consistent with Articles 82(1)(e) and section 109(1)(b) of the Elections Act.

It was urged on behalf of the 1st respondent that the applicant himself conceded that in 2017, the number of polling stations increased from 31,981 in 2013 to 40,883 in 2017. He also acknowledged that there was a total of 103 polling stations in prisons and 10 polling stations outside the country for diaspora voters and also that that the registration of Kenyan Citizens residing outside the country as diaspora voters recorded an increase from 2,637 in 2013 to 4,224 in 2017.

This, in itself, affirms the 1st respondent's position that, contrary the applicant's allegations, the 1st respondent is in fact abiding by the Court's directions by progressive registration of citizens residing outside the country and the progressive realisation of their right to vote by setting up diaspora polling stations as directed by the Supreme Court and in accordance with Article 82 (1) (e) of the Constitution.

The 1st respondent submitted further that the realisation of these rights is subject to budgetary allocations and the limitations that the 1st respondent is bound to encounter in this regard were acknowledged by the Supreme Court in its decision in the New Vision case (supra). This Court, it was urged, cannot go beyond what the Supreme Court held but the most it can do is to follow the decision of the Supreme Court. Counsel cited the decision in **Rift Valley Sports Club V Patrick James Ocholla (2005) eKLR** where Musinga, J.A noted that the doctrine of stare decisis is vital and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. Also cited in support of this doctrine is **Civil Appeal No. 172 of 1999 Mwai Kibaki v Daniel Toroitich Arap Moi (1999) eKLR**.

The Hon. Attorney General represented the 2nd and 4th respondents. He filed grounds of objection dated 17 June 2021and like the 1st respondent, he contends that prayers 1 and 2 have been spent. The Attorney General further urges that the 2nd and 4th respondents have nothing to do with the remaining prayers. At any rate the two respondents have not disobeyed the orders by the Supreme Court.

Like the 1st respondent, counsel for the 2nd and 4th respondents relied on the decision in **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others** (supra) but only for the point that the order of prohibition is prevents an action being taken yet in the instant case, there is nothing to prohibit since the 1st Respondent has already collected and verified signatures from voters.

The 3rd, 5th and 6th respondents did not file any response. The 7th respondent filed a replying affidavit and his case was more or less similar to the Hon. Attorney General's which is that neither has any reasonable cause of action nor any orders have been sought against him and therefore he was wrongly joined to these proceedings.

In any event, the 7th respondent has urged that while it is true that the Central Bank of Kenya has been tracking Diaspora Remittances and thus it has access to data points which can be utilized by the 1st, 2nd and 3rd Respondents to map international regions with large concentration of Kenyans, if it has to be sued then it can only be sued in its own name since it is a body corporate that ought to sue or be sued in its own name.

Nonetheless, the 7th respondent has urged that the Central Bank of Kenya availed all the necessary and relevant information as required under Article 35 of the Constitution and Section 5 of the Access to Information Act No. 31 of 2016. This information is available on the Central Bank of Kenya's website accessible by the applicant or any other party interested in the information.

In the event the information published by the Central Bank of Kenya is insufficient or unsatisfactory, the applicant ought to have invoked Section 8 (1) of the Access to Information Act No. 31 of 2016 and made an application for the desired information.

No application for any sort of information has been made to Central Bank of Kenya.

The 1st interested party filed grounds of objection and also submissions in support of these grounds.

The 1st interested has urged that all that the applicant is seeking in this suit is enforcement of the orders given by the Court of Appeal and the Supreme Court in the New Vision case (supra).

It is the 1st interested party's position that that the instant suit is incompetent and incurably defective because first, the applicant has prematurely invoked the jurisdiction of this Honourable Court without first exhausting all the available remedies; second, the application offends the provisions of Article 165 (5) and (6) of the Constitution of Kenya, 2010.

According to the 1st Interested Party, the applicant ought to have instituted contempt of court proceedings before the relevant Courts that issued the Orders either at the Supreme Court in Petition No. 25 of 2014, **Independent Electoral and Boundaries Commission (IEBC) vs New Vision Kenya (NVK Mageuzi) & 4 Others (2015)** or at the Court of Appeal in **Civil Appeal No.350 of 2012, New Vision Kenya (NVK Mageuzi) & 3 Others vs Independent Electoral and Boundaries Commission & 5 others (2014) eKLR.**

The 1st interested party has submitted further that under Articles 162 and 165 of the Constitution, this Honourable Court has supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. To this end, this Honourable Court cannot entertain proceedings that are essentially contempt of court of proceedings, disguised as judicial review, for disobedience of the orders of the Court of Appeal and the Supreme Court. It is up to the Court of Appeal and the Supreme Court to enforce compliance of their orders.

In particular, the applicant invoked section 5 of the Judicature Act according to which the Court of Appeal has powers to punish for contempt of court. And as far as the Supreme Court is concerned, the learned counsel for the 1st interested party cited the Supreme Court's decision in **Republic vs Ahmad Abolfathi Mohammed & Another, Supreme Court Petition No. 39 of 2018, (2019) eKLR** in which the Supreme Court affirmed its competence to punish for contempt of Court under section 28 of the Supreme Court Act, 2011. According to that section the Supreme Court has the same power and authority as the High Court to punish any person for contempt of Court.

Nonetheless, the 1st interested party contended that the State has made great steps in realizing diaspora voter registration and participation in elections including the registration and participation of voters in foreign countries such as Uganda, Tanzania, Rwanda, Burundi and South Africa in the General Elections of 2017. It is the 1st interested party's submission that the orders issued by the Supreme Court on 6 May, 2015 pertain to the progressive voter registration for Kenyan citizens living in the diaspora as voters, in general elections and not in a referendum.

In any event, there has been no violation or contravention of any fundamental freedoms or rights and neither has any proof of such violation or contravention been demonstrated by the applicant.

It was also urged that the right to vote under Article 38 of the Constitution is not an absolute right and pursuant to Article 255 (2) of the Constitution, it is not mandatory that every person takes part or votes in a referendum.

The learned counsel for the 1st interested party reiterated that disobedience of a court order cannot constitute grounds for judicial review proceedings and on this question, counsel cited the decision in **Hydro Waterwell (K) Limited vs National Water Conservation & Pipeline Corporation (2019) eKLR** in which **Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, (1997) eKLR** was cited with the approval on the scope of judicial review orders and, in particular, the order of mandamus.

The 1st respondent's position is that prayers (1) and (2) of the applicant's motion have been overtaken by events since, the time of filing its submissions, the 1st respondent had since concluded the process of signature verification as submitted to it by the 1st interested party in

accordance with Article 257 of the Constitution of Kenya, 2010. Again as at 8 February, 2021 a five judge bench of this Honourable Court had in, **Nairobi High Court Petition No. E282 of 2020, David Ndii and Others vs Attorney General and Others** issued conservatory orders restraining the 1st respondent from preparing or holding any referendum until after the hearing and determination of the suit.

The 2nd interested party filed a response to the applicant's application and, being a voter who lives outside the country, he supported the applicant's application. In particular, it was his position that the 1st respondent has not complied with the orders of the Court of Appeal and the Supreme Court on diaspora voter registration.

The 2nd interested party added that according to the IEBC Strategic Plan 2020-2024, the 1st respondent undertook to have, among other things, mapped Kenyan citizens residing outside the country between July 2020 and June, 2021; between September, 2018 and March 2019 the 1st respondent is also supposed to have reviewed what the 2nd respondent thinks is the Policy on Voter Registration and voting for Citizens residing outside Kenya which was adopted by the 1st Respondent and published in November 2015. And Between April 2021 and June 2021, the 1st respondent was supposed to have published and enacted the revised laws on registration of voters outside the country.

It is the 2nd interested party's contention that the respondent has not implemented any of these plans to the detriment of diaspora voters of whom he is part.

There is no doubt that the applicant's motion was, by and large, provoked by the bid to amend the Constitution by the President of the Republic of Kenya under the umbrella of what was described as the Building Bridges Initiative (BBI). The 'initiative' gave rise to what was described as the 'Building Bridges Initiative Steering Committee which at some stage of its existence came up with Constitution of Kenya Amendment Bill, 2020 proposing a raft of amendments to the Constitution of Kenya 2010. The Building Bridges Initiative Steering Committee, through its secretariat, then set in motion a process of collecting signatures in support of a purported popular initiative to amend the Constitution through the Constitutional Amendment Bill, 2020.

Upon the collection of signatures, the BBI Secretariat submitted the signatures to the 1st respondent for verification and submission to the County Assemblies and eventually to Parliament for approval.

Several constitutional petitions were filed questioning, among other things, the constitutionality of the process adopted for the amendment of the Constitution and also the content of Constitutional Amendment Bill, 2020. Many of the petitions that were filed at the time were consolidated in Petition No. 282 of 2020 which was amongst the many petitions that were filed but which was filed first in time.

It is around the same time that the applicant filed the present application seeking to stop the process of the proposed constitutional amendment mainly on the ground as much as the 1st respondent was in the process of receiving and verifying signatures and was intent on conducting a referendum on the Constitutional Amendment Bill, 2020, it had not complied with the orders given at different stages of appeal at the Court of Appeal and the Supreme Court levels in the New Vision Kenya case (supra) with respect to voting rights of the applicant, among other voters, in the diaspora.

However, unlike other parties in the Constitutional petitions who chose the constitutional petition route to present their grievances, the applicant in these proceedings chose the Judicial Review route.

Irrespective of which route the parties chose for redress of what they thought was a constitutional violation by the 1st respondent, among other parties that were sued, it was always inevitable that the orders made in the consolidated petition would, in one way or the other, have some impact on any other suit, including the present one, to the extent such other suit or suits were against the purported constitutional amendment process that included such aspects as the collection and verification of signatures and the envisaged referendum.

On 26 March 2021, while this suit was pending for determination, judgment in Petition No. 282 of 2020 was delivered nullifying, inter alia, the entire constitutional amendment process. As far as they are relevant to the present application, the Court determined as follows:

> ***"784. The orders which recommend themselves, which we hereby grant, are the following:***
>
> ***i. …***
>
> ***ii…***
>
> ***iii. …***
>
> ***iv. A declaration is hereby made that the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report established by the President vide Kenya Gazette Notice No. 264 of 3 January, 2020 and published in a special issue of the Kenya Gazette of 10 January, 2020 is an unconstitutional and unlawful entity.***
>
> ***v. A declaration is hereby made that being an unconstitutional and unlawful entity, the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report, has no legal capacity to initiate any action towards promoting constitutional changes under Article 257 of the Constitution.***
>
> ***vi. A declaration is hereby made that the entire BBI Process culminating with the launch of the Constitution of Kenya Amendment Bill, 2020 was done unconstitutionally and in usurpation of the People's exercise of Sovereign Power.***

vii. …

viii. A declaration is hereby made that the entire unconstitutional constitutional change process promoted by the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report is unconstitutional, null and void.

ix. A declaration is hereby made that the Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum before the Independent Electoral and Boundaries Commission carries out nationwide voter registration exercise.

x. A declaration is hereby made that the Independent Electoral and Boundaries Commission does not have quorum stipulated by section 8 of the IEBC Act as read with paragraph 5 of the Second Schedule to the Act for purposes of carrying out its business relating to the conduct of the proposed referendum including the verification of signatures in support of the Constitution of Kenya Amendment Bill under Article 257(4) of the Constitution submitted by the Building Bridges Secretariat.

xi. A declaration is hereby made that at the time of the launch of the Constitutional of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was no legislation governing the collection, presentation and verification of signatures nor a legal framework to govern the conduct of referenda.

xii. A declaration is hereby made that the absence of a legislation or legal framework to govern the collection, presentation and verification of signatures and the conduct of referenda in the circumstances of this case renders the attempt to amend the Constitution of Kenya through the Constitution of Kenya Amendment Bill, 2020 flawed.

xiii. …

xiv. …

xv. …

xvi. ….

xvii. A declaration is hereby made that Administrative Procedures for the Verification of Signatures in Support of Constitutional Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum, in the absence of legal authority and in violation of Article 94 of the Constitution and Sections 5, 6 and 11 of the Statutory Instruments Act, 2013.

xviii. ….

xix. A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill 2020.

xx. …

xxi. …

xxii. …

xxiii. …"

The decision was appealed against in Court of Appeal in **Civil Appeal No. E291 of 2021, IEBC vs David Ndii & Others**. In its judgment delivered on 20 August 2021, the Court of Appeal upheld the judgment of this Honourable Court. The Court noted as follows:

"A. We uphold the judgment of the High Court to the extent that we affirm the following:

i. The basic structure doctrine is applicable in Kenya. (Sichale, J. A. dissenting).

ii. The basic structure doctrine limits the amendment power set out in Articles 255 – 257 of the Constitution. (Okwengu & Sichale, JJ.A. dissenting).

iii. The basic structure of the Constitution can only be altered through the Primary Constituent Power which must include four sequential processes namely: civic education; public participation and collation of views; Constituent Assembly debate; and ultimately, a referendum. (Okwengu, Gatembu & Sichale, JJ. A. dissenting).

iv. Civil Court proceedings can be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to the Constitution. (Tuiyott, J.A. dissenting).

v. The President does not have authority under the Constitution to initiate changes to the Constitution, and that a constitutional amendment can only be initiated by Parliament through a Parliamentary initiative under Article 256 or through a popular initiative under Article 257 of the Constitution.

vi. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report (The BBI Steering Committee) has no legal capacity to initiate any action towards promoting Page 187 of 189 constitutional changes under Article 257 of the Constitution.

vii. The Constitution of Kenya Amendment Bill, 2020 is unconstitutional and a usurpation of the People's exercise of sovereign power.

viii. The Constitution of Kenya Amendment Bill, 2020 cannot be subjected to a referendum in the absence of evidence of continuous voter registration by the Independent Electoral and Boundaries Commission. (Sichale, J.A. dissenting).

ix. The Independent Electoral and Boundaries Commission does not have the requisite quorum for purposes of carrying out its business relating to the conduct of the proposed referendum, including the verification whether the initiative as submitted by the Building Bridges Secretariat is supported by the requisite number of registered voters in accordance with Article 257(4) of the Constitution. (Sichale, J.A. dissenting).

x. At the time of the launch of the Constitution of Kenya Amendment Bill, 2020 and the collection of endorsement signatures there was neither legislation governing the collection, presentation, and verification of signatures, nor an adequate legal/regulatory framework to govern the conduct of referenda. (Sichale, J.A. dissenting).

xi. County Assemblies and Parliament cannot, as part of their constitutional mandate, change the contents of the Constitution of Kenya Amendment Bill, 2020 initiated through a popular initiative under Article 257 of the Constitution.

xii. The second schedule to the Constitution of Kenya (Amendment) Bill, 2020 in so far as it purports to: predetermine the allocation of the proposed additional seventy constituencies, and to direct the Independent Electoral and Boundaries Commission on its function of constituency delimitation, is unconstitutional. (Sichale, J.A. dissenting).

xiii. The Administrative Procedures for the verification of signatures in support of the Constitution Amendment Referendum made by the Independent Electoral and Boundaries Commission are illegal, null and void because they were made without quorum and in violation of Sections 5, 6 and 11 of the Statutory Instruments Act, 2013. (Sichale, J.A. dissenting).

xiv. A permanent injunction be and is hereby issued restraining the Independent Electoral and Boundaries Commission from undertaking any processes required under Article 257(4) and (5) in respect of the Constitution of Kenya (Amendment) Bill, 2020.

B. We hereby set aside the following declarations and orders of the High Court:

i. That President, Uhuru Muigai Kenyatta has contravened Chapter 6 of the Constitution, and specifically Article 73(1)(a)(i), by initiating and promoting a constitutional change process contrary to the provisions of the Constitution on amendment of the Constitution.

ii. That Article 257(10) of the Constitution requires all the specific proposed amendments to the Constitution be submitted as separate and distinct referendum questions to the People. (Nambuye, Okwengu & Kiage, JJ.A. dissenting).

iii. The BBI Steering Committee established by the President vide Kenya Gazette Notice No. 264 of 3rd January 2020 and published in a special issue of the Kenya Gazette of 10th January 2020 is an unconstitutional and unlawful entity.

C. The Cross appeals fail and are hereby dismissed." (Emphasis added).

It is apparent from the judgment of this Honourable Court and which was substantially upheld by the Court of Appeal that the entire exercise initiated to amend the Constitution was nullified. And with this nullification there no longer exists any danger that the Chairperson of the 1st respondent either by himself or his agents, will receive signatures of any sort for purposes of amending the Constitution under the Building Bridges Initiative or the Constitutional Amendment Bill, 2020. If anything, the exercise of collection and verification of signatures for these purposes has been invalidated.

It follows that prayers (1) and (2) of the applicant's motion have been overtaken by events.

As far as prayers (3) and (4) are concerned, it is common ground, among the parties, that these prayers have got everything to do with matters that have been litigated upon by all the superior courts at various stages, initially, by this Honourable Court in **Constitutional Petition No. 331 of 2012, New Vision Kenya also known as NVK Mageuzi & Others versus IEBC & Others**; then by the Court of Appeal in **New Vision Kenya (Nvk Mageuzi) & 3 Others V Independent Electoral & Boundaries Commission & 5 Others (2014) EKLR** and ultimately by the Supreme Court in **Independent Electoral & Boundaries Commission V New Vision Kenya (Nvk Mageuzi) & 4 others (2015) eKLR**

As a matter of fact, with specific reference to the orders of the Court of Appeal that were subsequently refined by the Supreme Court, the applicant is seeking to stop the 1st respondent from undertaking any sort of referendum or even conducting a general election until those

orders have been complied with. In the same breath, the applicant also seeks to have the speakers of Parliament compelled to confirm receipt of annual reports on diaspora voter registration.

The question that has been posed is whether the applicant should have sought enforcement, in the Supreme Court, of the Supreme Court's decision which, going by the doctrine or *stare decisis*, is the ultimate decision that has to be complied with, or whether it was open for the applicant to institute a separate suit that, in effect, seeks enforcement of the decision.

The law on this question is that a court cannot entertain a suit where a matter that is directly or substantially in issue was directly and substantially in issue in an earlier suit, between the same parties or between parties under any of any them claim, and the subsequent suit has been heard and determined by a court of competent jurisdiction. This is called the doctrine of *res judicata* and is captured under section 7 of the Civil Procedure Act, cap. 21.

There is no doubt that the question of diaspora voter registration, which is the question that is directly and substantially in issue in the present suit, has been in issue, directly and substantially, in the New Vision Kenya Case. As noted earlier, the respondent was party to those proceedings. The applicant, on the other hand, could have claimed under any of the petitioners, including the Kenya Diaspora Alliance which I suppose represented the interests of diaspora voters, including the applicant, in the petition. In this regard the 'Alliance' could be properly described as a party under which the applicant would have properly laid his claim. In any event, considering that the applicant is basically seeking to enforce the orders in the New Vision Kenya goes to demonstrate how close the applicant is attached to that case in a way that would put him among the category of parties that would be subject to the doctrine of *res judicata*.

I am of the humble view that this Honourable Court cannot interrogate compliance of the Supreme Court orders without unnecessarily regurgitating matters that have been disposed of not only by the Supreme Court itself but also by this Court and the Court of Appeal. Since the gravamen of the applicant's application is the 1st respondent's non-compliance with the Supreme Court's order, I would agree with the 1st interested party that the most appropriate course available to the applicant as it is to any of the claimants in the New Vision Kenya is to seek enforcement of those order through any of the means available in accordance with the procedures at the Supreme Court. One such clear course is to seek to punish the culpable officers of the 1st respondent for contempt of court. And going by the applicant's application itself there is no doubt that the applicant is himself satisfied that the appropriate proceedings against the 1st respondent are the contempt of court proceedings; it is definitely for this reason that part of the title to the applicant's application for leave was couched as follows:

> ***"In the matter of an Application on behalf of the Applicant for leave to institute committal proceedings against the respondents for contempt of court." (Emphasis added).***

The applicant was thus clear in his mind, from the very beginning, that contempt of court proceedings against the respondents including, of course, the 1st respondent, was the clear and the most appropriate course for enforcement of the orders of the Supreme Court.

The Supreme Court reserves the power to punish for contempt under section 28 of the Supreme Court Act; that section reads as follows:

> ***28. Contempt of Court***
>
> ***(1) A person who—***
>
> ***(a) assaults, threatens, intimidates, or wilfully insults a judge of the Supreme Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court; or***
>
> ***(b) wilfully interrupts or obstructs the proceedings of the Supreme Court, in the Court; or***
>
> ***(c) wilfully and without lawful excuse disobeys an order or direction of the Supreme Court in the course of the hearing of a proceeding, commits an offence.***
>
> ***(2) A police officer, with or without the assistance of any other person, may, by order of a judge of the Supreme Court, take into custody and detain a person who commits an offence under subsection (1) until the rising of the Court.***
>
> ***(3) The Supreme Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding five days, or to pay a fine not exceeding five hundred thousand shillings, or both, for every offence.***
>
> ***(4) The Supreme Court shall have the same power and authority as the High Court to punish any person for contempt of Court in any case to which subsection (1) does not apply.(Emphasis added)***

(5) Nothing in subsections (1) to (3) shall limit or affect the power and authority referred to in subsection (4).

In affirming its power to punish for contempt, the Supreme Court made reference to this particular provision of the law in **Republic vs Ahmad Abolfathi Mohammed & Another** (supra) as the basis upon which can act in the event of contempt of its orders. The court noted as follows:

> ***"[27] We have taken note that the functioning of the reparatory aspect of the Contempt of Court Act (s. 244), at the moment, and with regard to the operations of the High Court and the Court of Appeal, admits of uncertainty quite apart from the fact that we are not applying them here but we affirm such not to be the case as regards the Supreme Court's competence, which is founded upon the Supreme Court Act, 2011 (Act No. 7 of2011), Section 28(1), (3), (4) and (5) …". (Emphasis added).***

The competence that the Court made reference to is its jurisdiction to punish for contempt of court whenever there is an affront to its judicial authority. It follows that if there was such an affront with respect to its orders in the New Vision Kenya case, there is every reason to believe that the court would have exercised its powers appropriately to affirm its authority if it had been moved appropriately.

What this boils down to is that there always was an equally convenient, beneficial and effective remedy that was available to the applicant other than invoke the judicial review jurisdiction of the honourable Court. It is trite that judicial review is a remedy of last resort. It is a process that should not be allowed to be clogged with unnecessary cases which are capable of being dealt with in another forum. In **R vs Epping and Harlow General Commissioners, ex p. Goldstraw (1983) 3 ALL E.R**. 257 Sir John Donaldson M.R. noted as follows:

> ***"It is a cardinal principle that, save in the most exceptional circumstances the jurisdiction to grant judicial review will not be exercised where other remedies were available and have not been used (at page 262)."***

It is only in cases where the alternative procedure is less convenient or less appropriate that the court may exercise its discretion and entertain an application for judicial review. **(See R Versus Hillingdon L.B.C ex p. Royco Homes (1974) Q.B. 720).** It has not been suggested by the applicant that contempt of court proceedings against the 1st respondent or any other alleged contemnor in the New Vision Kenya case were not as convenient or appropriate as judicial review proceedings.

In the ultimate I am satisfied that the applicant's application is misconceived and an abuse of the process of this Honourable Court. It is hereby dismissed. Owing to the public interest in the suit, I make no order as costs. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 14TH DECEMBER 2021.

NGAAH JAIRUS

JUDGE