



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE , MUSINGA & M’INOTI JJ.A)

CIVIL APPEAL NO. 350 OF 2012

BETWEEN

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

KENYA DIASPORA ALLIANCE.....2ND APPELLANT

DR. SHEM ODONGO OCHUODHO.....3RD APPELLANT

MR. GICHANE MURAGURI.....4TH APPELLANT

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

MINISTER FOR STATE FOR IMMIGRATION &

REGISTRATION OF PERSONS.....2ND RESPONDENT

MINISTER FOR FOREIGN AFFAIRS & INTERNATIONAL

COOPERATION.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE MINISTER FOR JUSTICE, NATIONAL COHESION &

CONSTITUIONAL AFFAIRS.....5TH RESPONDENT

THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....INTERESTED PARTY

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Majanja, J.) dated 15th November, 2012

in

H.C. Petition No. 331 of 2012)

JUDGMENT OF THE COURT

1. ***New Vision Kenya (NVK Mageuzi), Kenya Diaspora Alliance, Dr. Shem Odongo Ochuodho and Mr. Gichane Muraguri***, respectively the 1st, 2nd, 3rd and 4th appellants, filed Nairobi HC Petition Number 331 of 2012 against the ***Independent Electoral and Boundaries Commission (IEBC), the Minister for State for Immigration and Registration of Persons, the Minister for Foreign Affairs and International Cooperation, the Attorney General, and the Minister for Justice, National Cohesion and Constitutional Affairs***, respectively the 1st, 2nd, 3rd, 4th and 5th respondents. The Kenya National Commission on Human Rights was named as an ***interested party***.
2. The petition was predicated under Articles 38(3) (a) & (b), 1,10,14, 19, 20, 21, 22, 23, 24, 27, 38, 48, 50, 81 ,82, 83, 88, 89, 159, 165, 249, 258 & 259 of the Constitution of Kenya, 2010, (“***the Constitution***”) and Rules 3 & 17 of the ***Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution (Practice and Procedure) Rules 2012*** and “any other enabling provisions of law”.
3. In summary, the appellants sought from the High Court 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; a declaration that the failure by the respondents to provide the Diaspora with the opportunity to register and vote is a violation to their fundamental right to vote and a contravention of Article 82 (1) of the Constitution which provides for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote; a declaration that Kenya citizens in the Diaspora who are dual citizens need not register as Kenyan citizens and are eligible to be registered as voters and to participate in the general election; an order that the respondents do adequately provide for voter registration and satisfactory voting mechanisms for Kenyans living in the Diaspora, not just for presidential but also for all other offices as well; that the 1st respondent be ordered by the Court to declare and set up more polling centers over and above embassies and consulates and deploy IEBC officials as returning officers or to collaborate with host electoral bodies to provide similar service; that the Court do order the 1st respondent, where tenable, to give priority and preference to and accordingly make provision for secure electronic voting through online system and mobile phone based text facility; an order that the respondents jointly and severally do put in place infrastructure to allow for maximum number of Kenyans in the Diaspora to register as voters and to participate in the general elections on a cost effective basis either by electronic voting or otherwise; costs of the petition and any other relief or orders that the court shall deem just and fit to grant.
4. The petition was supported by affidavits deponed by the 3rd and 4th appellants in their capacities as trustees of the Kenya community abroad. The complaints raised by the appellants in summary were that the 1st respondent in its planning to the run up to the 2013 general election had overlooked the provisions for the registration and participation of Kenyans in the Diaspora; that if voter registration for citizens outside Kenya was not conducted, such persons would lose their right to vote; that their efforts to engage the 1st respondent to deal with the concerns of Kenyans in the Diaspora had not borne fruits and that there was a likelihood of violation of the fundamental rights and freedoms of those Kenyans.
5. The 1st respondent opposed the petition by a replying affidavit sworn on 28th September, 2012 by ***Praxedes Tororey***, the Director Legal and Public Affairs, contending that the appellants’ petition did not raise any justiciable matter and that it was speculative and premature as the 1st respondent was taking steps within the law to register voters in the Diaspora.

6. The parties were heard through written submissions and oral arguments in Court. After evaluating, assessing and analyzing the rival pleadings and arguments, the trial Judge drew out three issues for determination namely, the nature and extent of the right to vote for Kenyans residing outside the country; the extend of the responsibility of the IEBC to facilitate this right; and whether the Court should grant the reliefs sought. Ultimately the learned judge dismissed the petition with costs after he found that the same did not have merit.
7. The appellants were aggrieved by that decision and appealed to this Court citing sixteen (16) grounds of appeal. However, on the day of the hearing of the appeal, **Mr. Kounah**, learned counsel for the appellants, elected to argue only grounds 1,2,3,4 and 9. These are:-
 1. ***That the learned Judge erred by failing to appreciate that upon finding both in fact and law that the petitioners had a constitutional right to institute the petition on apprehension of violation of their right to vote by turning around to hold that the right is not absolute but may be subjected to reasonable restrictions. (sic)***
 2. ***The learned Judge erred in fact and in law by failing to appreciate that the first respondent (IEBC) has not carried out its mandate in reference to Kenya citizens living abroad.***
 3. ***The learned Judge erred in law and in fact by failing to consider all the material presented before the Court in a wholesome manner.***
 4. ***The learned Judge erred in law and in fact by giving deference to the 1st respondent (IEBC) to realize and or protect the petitioners' rights to participate and vote in the upcoming general election scheduled for 4th March, 2012 (2013) (sic).***
 9. ***The learned Judge erred in law by misapprehending international instruments and the Constitution of Kenya 2010.”***
8. In his oral submissions **Mr. Kounah** urged us to allow the appeal as the petitioners had made out a case and the learned trial Judge should have found in their favour. He submitted that Kenyans in the Diaspora moved to court in 2010 to protect their right to vote during the referendum on the new Constitution, following which the court directed the predecessor of the current IEBC to initiate a framework for enjoyment of the right to vote by the appellants; that the appellants apprehended violation of their right to vote in the 2013 elections and moved to court to enforce their rights as the IEBC had not provided a framework to facilitate those rights.
9. Counsel further submitted that although the IEBC had filed a replying affidavit in opposition to the appellants' petition, it failed to address the issues raised by the appellants namely; enforcement of their right to vote and the framework the IEBC intended to put in place to facilitate the realization of their right to vote. Instead, he submitted, the IEBC had addressed side issues such as dual citizenship. The learned trial Judge, counsel submitted, also failed to hold that the appellants moved to court to enforce their political rights rather than social rights; that the mode of voting the appellants were agitating for had been approved and set up in other jurisdictions; and also failed to uphold the appellants' legitimate expectation to vote.
10. **Mr Kounah** further urged that the learned Judge had erred by misapprehending the appellants' legitimate expectations on the right to vote by holding that the right to vote was not absolute and that it had to be realized progressively; by holding that the appellants' enjoyment of the said right was subject to logistical considerations; by using logistical considerations as an excuse to deny the appellants the exercise of their right to vote; by taking into consideration facts not supported by evidence before him; and by failing to appreciate that the appellants were not seeking to be recognized as citizens but to be facilitated to exercise their right to vote.
11. It was counsel's further argument that although the appellants petitioned the High Court in order to be facilitated to participate in the general elections of 4th March, 2013, which is now past, they are nonetheless still aggrieved and are still crying for justice from this Court because the 1st respondent had backed out of its promise to facilitate the appellants to participate in the last general elections through embassies; that the IEBC has not declared the voters in the Diaspora as a constituency; that it has also failed to put in place infrastructure to facilitate the continuous

registration of the appellants as voters; that the IEBC discriminated against the appellants by facilitating only Diaspora voters in the East African countries with the opportunity to vote in the last election; and that facilitation of voters in the East African countries only went contrary to the IEBC own public announcement that it would facilitate all the voters in the Diaspora to exercise their right to vote through their embassies. Lastly, counsel submitted, that it was not sufficient for the court merely to note that Parliament had put in place legislation and regulations to enable the IEBC discharge its mandate, it should have gone further to ensure that the IEBC fulfilled its mandate to the appellants.

12. **Mr. Odhiambo**, learned counsel for the IEBC, urged us to dismiss the appeal on the grounds that the learned trial Judge had interpreted the provisions of the law as they had been placed before him; that his application of the law was proper and it should not be interfered with as no error was committed; and that since the major complaint by the appellants against the IEBC was that it had failed to facilitate the enjoyment of their right to vote, the learned Judge was entitled to look at the prevailing circumstances and determine the practicability of enjoyment of that right by the appellants at that point in time. Learned counsel further argued that the learned trial judge was entitled to find that the appellants' right to vote would be realized progressively, taking into account logistical considerations such as financial limitations. Lastly, counsel argued that the issue of the alleged preferential treatment of Kenyans in East Africa should not be given weight as it was a new matter that did not feature in the High Court.
13. **Mr. Odiwuor**, learned counsel for the 2nd, 3rd, 4th and 5th respondents, also urged us to dismiss the appeal on the grounds that the appeal is nothing but an academic exercise; that the court's ruling that Kenyans in the Diaspora have a right to vote, which right is to be realized progressively cannot be faulted as the same was within the provisions of law as interpreted and applied by the High Court; that if the appellants have an issue with the interpretation of the relevant constitutional provisions, they ought to seek an opinion from the Supreme Court to determine whether the realization of the right to vote by the Diaspora was instantaneous or gradual; and that the mandate of this Court is limited to making a substantive decision on the matter and not giving an advisory opinion.
14. In response to submissions by learned counsel for the respondents, **Mr. Kounah** maintained that the appellants were genuinely aggrieved by the impugned judgment; that the learned Judge had misapprehended the progressive right to enjoy a political right to vote with the right to enjoy a progressive social right; that the appellants went to the High Court seeking to enforce a political right and not a social right; that the Court having found that the IEBC was the body mandated to facilitate that right, it should not have gone further to curtail that same right by stating that it was subject to availability of resources; that the proper avenue to enforce that right was a court of law; that the appellants are properly before this Court as the mandate of the IEBC is a continuous one; and that this Court can give appropriate directions regarding the enjoyment of the right to vote by the appellants.
15. This being a first appeal, our mandate is as set out in Rule 29(1) of this Court's Rules, namely; to re-appraise the evidence and draw out our own inferences of fact. In ***Sumaria and another vs Allied Industries Limited [2007] 2KLR 1*** this Court stated, *inter alia*, that: "***being a first appeal the Court was obligated to reconsider the evidence, re-evaluate it and make its own conclusion***"

In ***Mujere vs Mwechelesi & Another [2007] 2 KLR 159*** the Court stated that "***as an appellate Court, the Court had to be very slow to interfere with the trial judge's findings unless it was satisfied that either there was absolutely no evidence to support the finding or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupported conclusion.***"

16. The rival arguments set out above present three issues for our determination in the disposal of this appeal, namely:
 1. ***Whether the learned trial Judge misapprehended the nature and extent of the right to vote for Kenyan citizens residing outside the country.***
 2. ***Whether the learned trial Judge misapprehended the responsibility of the IEBC in facilitating***

that right; and

3. ***Whether the learned trial judge erred in failing to grant the appellants the reliefs they had sought.***
17. With regard to the first issue on the nature and extent of the appellants' right to vote, the learned trial Judge interrogated and construed the provisions of Articles 1, 22 (1), 38(3), 81, 82 and 83 of the Constitution and found that the right to vote is essential to Kenya's democracy; that Article 38(3) protects the right to vote as a political right; that Articles 81, 82 and 83 set out how the right to vote is to be exercised; that the right to vote protected under Article 38 is realized and implemented by the IEBC; and that Article 38(3) attaches a caveat onto the enjoyment of the right to vote, namely; that it should be availed without unreasonable restriction. In defining what is meant by "***unreasonable restriction***," the learned trial Judge interrogated Articles 81, 82 and 83 of the Constitution and found that Article 81 sets out the general principle, for the electoral system which determines whether the restriction contemplated under Article 38(3) is reasonable; and that Article 82 (1) (2) empowers Parliament to enact legislation for the progressive registration of the right to vote by citizens residing outside Kenya.
18. The learned Judge drew inspiration from selected International Human Rights instruments on the right to vote. These were accessed through Article 2 (5) and (6) of the Constitution. Observation was made that **Article 25** of the ***International Covenant on Civil and Political Rights (ICCPR)*** guarantees every citizen a right to vote first without distinction based on race, religion, political or other opinion and secondly, without unreasonable restrictions; Article 41 of the ***International Convention on the Protection of the Right of all Migrant Workers and Members of their Families*** guarantees immigrant workers and members of their families 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 legislations. The State parties are enjoined to facilitate the exercise of that right through legislation. **Article 13** of the ***African Charter on Human and Peoples Rights*** guarantees every citizen a 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, with no specific mention of the right of citizens living outside their countries. Mention was also made of **Article 12** of the ***African Charter on Democracy, Election and Governance*** to which Kenya is not a party which simply enjoins State parties to undertake to implement programmes, and carry out activities designed to promote democratic principles and treaties as well as consolidate a culture of democracy and peace.
19. Turning to Europe, the learned Judge drew a comparison with the ***Report on Electoral Law and Electoral Administration in Europe's (Study No. 352/2005)*** by the Venice Commission which was the Council of Europe's advisory body on constitutional affairs. In this report, external voting rights were considered and it was noted that guarantees on external voting rights to citizens living outside the country was emerging as a new phenomena in the 1980-90s noticeably in many emerging or new democracies.
20. On the basis of the above survey, the learned trial Judge concluded that although many countries had made provisions in either their constitutions or statutes for their overseas citizens to vote in elections, there was demonstration (in international law) that the right to vote for citizens living abroad was not absolute and that the same may be restricted based on reasonable criteria; that it was safe to hold that international law had not recognized 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 recognized, it is subject to legislation which must meet the reasonable standard test.
21. We have revisited those provisions and construed them, bearing in mind that the Constitution is the supreme law of the land and any other law which is in conflict with it is void to the extent of the conflict; that the right to vote is a fundamental right recognized under the ***Bill of Rights*** enshrined in the Constitution; that the enjoyment of the said right is subject only to the limitations contemplated in the Constitution; (Article 19(3) (c)); that it is the duty of the State to ensure enjoyment of the right to vote by the appellants (Article 21 (1)); that the right to vote is available to every person (Article 22(1), that the High Court has the mandate to adjudicate over allegations of infringement of the right to vote (Article 23(1)); and that there is permissible limitation of enjoyment of the fundamental right to vote if it is limited by law, and such limitation is

- reasonable and justifiable (Article 24 (1)).
22. Applying the above principles to the rival arguments herein, we find that the learned trial Judge was right in holding, and we also hold, that the right to vote is a fundamental right; that it is available to the appellants; that the appellants were justified in moving to the Court to enforce that right in the wake of an apprehension of a threatened breach; and that the High Court is the proper forum for adjudication on any dispute that may arise over the right to vote.
 23. We further find that the learned Judge was right in holding that enjoyment of the right to vote as a fundamental right is not absolute. This is borne out by Article 19 (3) (c) which stipulates clearly that enjoyment of rights in the Bill of Rights is subject to limitation contemplated in the Constitution. Article 24(1) of the Constitution goes further to specify that **“a right or freedom in the Bill of Rights shall not be limited except by law”**. This means that where the law other than the Constitution places a limitation on the enjoyment of a fundamental right, it will be perfectly in order so long as it satisfies the conditions set out in Article 24.
 24. The relevant provisions on the right to vote are those set out in Articles 38 (3) (c), 81, 82 and 83. When construing these, the learned Judge was obligated to bear in mind Articles 20(3) (a) (b), Article 21(1), Article 24(1) and Article 259 (1). Article 20(3) enjoins the Court to adopt an interpretation that most favours the enforcement of a right or freedom; Article 21(1) places the responsibility to ensure the enjoyment of a fundamental right on to the State or a State organ properly so mandated; Article 24(1) enjoins the Court when deciding whether to limit the enjoyment of a fundamental right to take into consideration the nature of the right or fundamental freedom, the importance of the limitation, the nature and extent of the limitation and lastly, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
 25. Article 20 (4) enjoins a court of law, tribunal or other authority when interpreting the Bill of Rights to promote the values that underpin an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the **Bill of Rights**. Article 259 (1) (a) (b) (c) (d) and (3) require the Constitution to be interpreted in a manner that promotes its purposes, values and principles and advances the rule of law and the human rights and fundamental freedoms in the **Bill of Rights** and which permits the development of the law and contributes to good governance. It should also be in line with the well known guiding principle that **“The law is always speaking.”**
 26. As already indicated above, the learned trial Judge construed these same provisions and arrived at the conclusion that indeed the right to vote was available to the appellants save that it was not absolute and was subject to reasonable and justifiable restrictions. **“Black’s Law Dictionary”**, 9th Edition (Bryan A. Garner) at page 944 defines **“justifiable”** as meaning **“capable of being legally or morally justified; excusable, defensible.”** **“Reasonable”** is defined at page 1379 as **“fair, proper, or moderate under the circumstances ...According to reason.”**
 27. In the Oxford Concise English Dictionary, 9th Edition at page 737, **“Justifiable”** is defined as **“That which can be justified or defended; “reasonable”** is defined at page 1144 as **“having sound judgment, moderate, ready to listen to reason, in accordance with reason, not absurd, within the limits of reason; and at page 1093, “progressive”** is defined as **“moving forward, proceeding step by step.”**
 28. We find, as did the learned trial judge, that Article 38(3) of the Constitution recognizes the right to vote. The said right is available without **“unreasonable restriction.”** In essence, all that this means is that reasonable restrictions on the right to vote are permissible. However, in order to determine what is meant by **“reasonable restrictions”**, one has to interrogate the meaning of the relevant Articles of the Constitution, particularly Articles 81, 82 and 83. vide Article 81, the right to vote is tied to an electoral system to facilitate the enjoyment of that right. Under Article 38, the right is guaranteed to every adult citizen. In the absence of any qualification of **“every adult citizen”** the target group has to be construed to mean every adult citizen who is both within and without Kenya. Those in the **“without”** include the appellants who are citizens in the Diaspora.
 29. On the basis of the above analysis, we find that the appellants fell within the target group envisaged in Article 83. We also affirm the finding of the learned Judge that the right to vote was available to them subject to reasonable and justifiable restrictions. Article 21(1) places an obligation on the State and every State Organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Vide sub article 21(2) the State is enjoined

to take legislative policy and other measures including the setting of standards to achieve the progressive realization of the rights guaranteed under the Bill of Rights. Article 20(5) (a) places an obligation on the State to show that it does not have resources to ensure enjoyment of the right by the claimant.

30. As found by the learned trial Judge, in compliance with its obligation under Article 21 of the Constitution, the Government under Article 88 (1) and (5) established the IEBC and mandated it to exercise its powers and perform its functions in accordance with the Constitution and national legislation. Vide Article 89 (1) the IEBC was mandated to delineate two hundred and ninety constituencies for the purposes of elections as stipulated in Article 97(1) (a) of the Constitution. To facilitate the exercise of the mandate bestowed on the IEBC and in obedience to the prescriptions in Articles 81, 82 and 83 of the Constitution, Parliament enacted the ***Independent Electoral and Boundaries Commission Act No. 9 of the 2011***. Vide Section 4 of the Act the Commission was given the mandate, among others, to conduct and or supervise referenda and elections to any elective body or office established by the Constitution and also to carry out the continuous registration of citizens as voters, the regular revision of the voters' roll, and the delimitation of constituencies and wards in accordance with the Constitution.
31. Section 25 of the Act requires the IEBC to respect the citizens' right to vote enshrined in Article 38 of the Constitution. The Elections Act No. 24 of 2011 was enacted by Parliament to actualize the operations of the IEBC. Among its functions is the preparation of voter registration registers including those of citizens living outside Kenya. Registration of voters is anticipated to be continuous under Section 5(1) of the Act. Section 109 of the Act makes provision for the promulgation of Regulations for, purposes enumerated in this same section. Pursuant to this provision, regulations governing the registration of voters living outside Kenya were made. Regulations 34-39 of the Elections (Registration of Voters) Regulations 2012 provide as follows:-

“34. (1) The Commission shall, at regular intervals publish the names of countries in which registration and voting is scheduled to take place

(2) A decision by the Commission to register Kenya citizens residing outside Kenya or conduct election outside Kenya shall be based on the presence of a Kenyan embassy, High Commission or consulate.

35 A register of voters who are Kenya citizens residing outside Kenya shall contain the particulars set out in form J in the schedule.

36. A Kenya citizen residing outside Kenya shall apply for registration as a voter in form J set out in the schedule.

37. A Kenya citizen residing outside Kenya shall apply for registration as a voter upon production of a valid Kenya passport.

38. For the purpose of registration of Kenya citizens residing outside Kenya as voters the Commission may appoint any representative of Kenya who shall not be the Ambassador, Deputy Ambassador, High Commission, or Deputy High Commissioner of a Kenyan mission.

39. A Kenya citizen residing outside Kenya shall only participate in a presidential election or a referendum”

34. As we have noted, the learned trial Judge held that the right to vote for Kenya citizens residing outside Kenya is a right to be realized progressively; that the word “***progressive***” had not been defined in either the Constitution or the relevant Acts on elections i.e. the IEBC Act No. 9/2011 and Elections Act No. 24 of 2011; that the core obligation on the State was to take appropriate legal administrative and policy measures to realize the rights protected, which requirement had to be assessed in the light of the prevailing circumstances, the resources available and bearing in mind of the obligation not to diminish the rights secured; that Parliament had complied with the provisions of Article 261(1) of the Constitution

by enacting the Elections Act 24 of 2011 and the promulgation of Regulations made thereunder.

35. The learned Judge further found that the Regulations provide a framework for the progressive realization of the right of Kenyan citizens living outside Kenya; that the IEBC had been given the responsibility to implement the provisions relating to the realization of the rights of Kenyan citizens living outside Kenya because it had the technical expertise and competence to do so and that the right to vote for persons residing abroad presented complex problems.

36. The question we have to ask ourselves is whether the above findings of the learned trial Judge accord with the Constitution on the right of citizens living outside Kenya to vote. Our response is in the affirmative, first; because the constitutional provisions analyzed do not accord this right in absolute and immediate terms. For example, Article 19(3) (c) subjects the right to vote to limitations contemplated in the Constitution. Article 24(1) permits limitation of the right by law, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors including, the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others, the relation between the limitation and its purpose' and whether there are less restrictive means to achieve the purpose. Article 38(3) also permits reasonable restrictions on the enjoyment of this right.

37. We also take judicial notice of the fact that the decision of the learned Judge was handed out on the 15th day of November, 2012 by which time the IEBC Regulations on the preferential voting by the Kenya citizens living abroad had already come into force. As such, the learned Judge could not have ignored them. We have also taken judicial notice of the fact that the last general elections of 4th March, 2013 were only four (4) months away. Was that time factor to be ignored? Would it have been practicable for the IEBC to roll out a registration and voting system to accommodate all Kenyans, including all those in the Diaspora to vote in all the six categories of elections that took place on 4th March, 2013? We think not. Such an exercise called for the marshalling of huge resources both financial and human in order to make it feasible if it were at all to take place.

38. Regarding the learned trial Judge's consideration of international law and the comparison of the enjoyment of social rights and the voting rights, we find no error was committed in doing so, reason being that these international norms were introduced into the Constitution vide Article 2(5) and (6) and the learned Judge noted as such. Article 2 (4) mandated the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms, and among these, is the right to vote. The learned Judge observed that Kenya was party to the ***International Covenant on Civil and Political Rights (ICCPR)*** and the ***African Charter on Human and Peoples Rights (ACHPR)*** both of which recognize the right to vote as a fundamental right; that this right is general and that there was no preferential treatment for citizens living abroad. In Kenya this right is enshrined in the Constitution. Its enjoyment is facilitated by the provisions of the Elections Act and the IEBC Act.

39. On citizens living in East African countries other than Kenya, it was submitted that they were allowed to vote in the last election of 4th March, 2013. As submitted by the 1st respondent, this was not an issue before the learned trial Judge. Neither was it one of the grounds of appeal upon which the appeal was based. The above notwithstanding, it is our view that if any voting took place in the East African countries, then these fell into the category of electoral centers for Kenyans living abroad, where there were already established Embassies, High Commissions and Consulates. While we take judicial notice of possible existence of these facilities in the East African territories, we do not believe that this is a reason for the appellants to claim that the Kenyans in other areas were discriminated against. On the contrary, it is consistent with the first progressive towards the facilitation of Kenyans in the Diaspora to register and to vote.

40. As for comparison with the right to enjoy social rights, all that the learned Judge did was to find that both of these require resources to be put in place. There was no error in that holding as Article 21(2) enjoins the State to initiate measures subject to availability of resources. Article 38 (3), the very bedrock

of this right, permits its enjoyment subject to reasonable restrictions. As we have mentioned above, some of these may be on account of lack of resources both financial and human to set up Embassies, High Commissions and Consulates in each and every country where a Kenyan may be living. Not to be lost sight of was the fact that the expansive right to vote had just been introduced in 2010 and by November, 2012 the March, 4th 2013 elections were just less than six months away. It cannot therefore be ruled out that the time frame within which the IEBC could reasonably be expected to plan and meet its obligation to both the local and Diaspora voters may have been rather too short, making it difficult to cater for all Kenyans in the Diaspora.

41. The learned judge concluded as follows:

***“41. In summary, I have found that, the right of citizen to vote guaranteed under Article 38(3) is not absolute and may be subject to reasonable restriction. Such restriction for citizen residing outside Kenya are that that right is progressively realized 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.*”**

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

42. We would add that, over and above the other provisions of the Constitution considered above, Article 82(1) (e) of the Constitution leaves no doubt that the right to vote of Kenyans in the Diaspora is to be achieved progressively. Article 82, which requires Parliament to enact legislation on elections requires parliament to enact legislation that among other things provides for ***“the progressive registration of citizens residing outside and the progressive realisation of their right to vote.”***

43. As mentioned earlier on, it is to be noted that the major reasons for the appellants moving to Court was to facilitate their participation in the general elections which were then impending. That is now past. The Court was however asked to be forward looking. In doing so, we have to determine whether there was anything else that the learned trial Judge could have done besides dismissing the petition. This arises from the fact that though the proximity of the time span between the time IEBC was requested to take remedial action to facilitate the appellants participate in the then impending general election for 4th March, 2013 may have been too short for the IEBC to make any meaningful suitable arrangement to accommodate the appellants’ desire to participate in the said past election, we are of the view that directions on the way forward as regards future preparedness was feasible, considering that there were other declarations which were sought besides the one that was seeking facilitation to vote in the last general election.

44. On costs, we are of the opinion that the appellants had a genuine concern to move to Court in a bid to enforce their right to vote in the 4th March 2013 general election. It is on account of constraints attributable to the State that they were not able to participate in the said elections. We also find that having missed out on the 4th March, 2013 elections, they were entitled to seek the Court’s intervention to ensure that in future, progressively more Kenyans in the Diaspora have the opportunity to vote. Hence their decision to pursue this appeal to its logical conclusion is sound and proper in order for them to seek directions to issue to the IEBC in particular and the State in general to take remedial measures to ***avoid a repeat of the 4th March, 2013 scenario*** in so far as Kenyans in the Diaspora are concerned.

45. We are therefore inclined to give the following directions on the way forward.

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 forth coming general elections on a cost effective basis.

46. Since the appellants have partially succeeded in this appeal, we are inclined to grant them half costs both in this Court and in the High Court.

Dated and delivered at Nairobi this 6th day of June, 2014.

R.N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

D/O