REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, SCJJ.)

PETITION NO. 25 OF 2014

-BETWEEN-

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....APPELLANT

-AND-

NEW VISION KENYA (NVK MAGEUZI).....1ST RESPONDENT
KENYA DIASPORA ALLIANCE.....2ND RESPONDENT
DR.SHEM ODONGO OCHUODHO.....3RD RESPONDENT
MR. GICHANE MURAGURI.....4TH RESPONDENT
THE ATTORNEY-GENERAL.....5TH RESPONDENT

(Appeal from the Judgment and Order of the Court of Appeal sitting at Nairobi (Nambuye, Musinga and M'inoti, JJ.A) delivered on 6th June, 2014 in Nairobi Civil Appeal No. 350 of 2012)

JUDGMENT

A. BACKGROUND

[1] On 31st July, 2012, the 1st to 4th respondents filed a petition before the High Court at Nairobi, seeking a declaration that Kenyan citizens in the diaspora bear a fundamental and inalienable right to be registered as voters; to vote; and to seek elective office pursuant to Article 38(3) (a) and (b) of the Constitution of Kenya,

2010. They also sought a further declaration that Kenyan citizens in the diaspora who hold dual citizenship were eligible to be registered to vote, and to participate in the general elections. Finally, they sought an Order requiring the Independent Electoral and Boundaries Commission (IEBC) to provide voter-registration, as well as satisfactory voter-mechanisms for Kenyans living in the diaspora.

[2] On 15th November, 2012, the High Court *(Majanja J),* delivered its Judgment, dismissing the petition.

[3] Aggrieved by the decision of the High Court, the 1st, 2nd, 3rd and 4th respondents appealed to the Court of Appeal, specifying their grounds as follows:

(i) the learned Judge erred by failing to appreciate that upon finding both in fact and in law that the petitioners had a constitutional right to institute the petition, on apprehension of violation of their right to vote, it could not be maintained that the right is not absolute and may be subjected to reasonable restrictions;

(ii) the learned Judge erred in fact and in law by failing to appreciate that IEBC has not carried out its mandate in relation to Kenya citizens living abroad;

(iii) the learned Judge erred in law and in fact by failing to consider all the material presented before the Court;

(iv) the learned Judge erred in law and in fact in allowing IEBC a discretion, in the sustenance of the petitioners' right to participate and vote in the general election scheduled for 4th March, 2013;

(v) the learned Judge erred in law by misapprehending international instruments, as well as the Constitution of Kenya, 2010.

[4] By a Judgement of 6th June, 2014, the Court of Appeal partially upheld the appeal, and gave directions that Kenyan dual-citizens living in the diaspora were eligible to be registered as voters. The Court also directed IEBC to progressively set up more voter-registration centres for Kenyans living in the diaspora, for all elective positions. The Court also ordered IEBC and certain other State organs to put in place an infrastructure for the registration of diaspora voters, in time for the elections in question.

[5] Aggrieved by the Appellate Court's decision, the appellant herein filed an appeal before this Court on 17th July, 2014, pursuant to Article 163(4)(a) of the Constitution: on the basis that the appeal raised questions of interpretation and application of Articles 83(2), 94(1) & (5), 82(1)(e) and 88(5), in relation to the right to vote. The appellant's grounds of appeal were thus stated:

(i) the learned Judges of Appeal misinterpreted and misapplied Articles 83(2), 94(1) & (5), 82(1)(e) and 88(5) of the Constitution as read with Section 109(1) of the Elections Act, and Regulation 39 of the Elections

(Registration of Voters) Regulations 2012, when they ordered the appellant to provide for voter-registration for Kenyans living in the diaspora for all elective positions, contrary to existing legislation;

(ii) *the learned Appellate Court Judges, in ordering that voters in the diaspora be registered to vote in all elective positions, failed to interpret the Constitution holistically, and to evaluate and consider all the relevant provisions of the Constitution, the Elections Act, and the Regulations instituted thereunder;*

(iii) *the learned Judges of the Appellate Court contravened Article 50(1) of the Constitution, in making the Order that voters in the diaspora be registered to vote in all elective positions, without allowing the appellant herein an opportunity to be heard on pertinent questions, which Order had not been sought in the appeal – thus violating the appellant's constitutional right to fair hearing.*

[6] The appellant now seeks the following Orders:

(i) *the part of the Judgment of the Court of Appeal dated 6th June, 2014, that "an order be and is hereby made directing that the respondents do adequately provide for progressive voter registration for Kenyans living in the diaspora for all elective positions," be set aside;*

(ii) *the part of the Judgment of the Appellate Court, that "since the Appellants have partially succeeded in this Appeal, the Court of Appeal is inclined to grant them half costs both in this Court and in the High Court", be set aside.*

(iii) *any other Orders that the Supreme Court may deem appropriate to grant.*

[7] The appeal is founded upon the provisions of Article 163(4)(a) of the Constitution, calling for this Court's interpretation of certain provisions of the Constitution, and electoral code. In the circumstances, this case bears significance not just for the appellant or the respondents, but for the entire Kenyan public. The resolution of the pertinent issues will settle the question of diaspora vote – thus signalling the path of the law bearing upon voting practices.

B. THE PARTIES' SUBMISSIONS

(i) The Appellant

[8] Learned counsel for the appellant, Mr. Obondi, submitted that the right of all Kenyans to vote was envisaged, under the Constitution, to roll out on a progressive basis; and that the appellant had already embarked upon the implementation process, by registering Kenyans living in the East African countries as voters. The appellant's contention was that the Court of Appeal fell into error, when it directed the progressive registration *of 'Kenyans living in the diaspora for all elective*

positions.' The appellant's submission was that this Order was contrary to the Constitution and the electoral code, and was incapable of implementation.

[9] Counsel submitted that while Article 38 of the Constitution guaranteed the right of every Kenyan to be registered as a voter, and to vote by secret ballot in any election or referendum, Article 19 allowed limitation of rights in certain instances, and Article 38(3) guaranteed these rights only insofar as there are no unreasonable restrictions. Counsel urged that Article 25 of the Constitution, which specified the non-derogable rights, did not touch on the right to vote: and so, this right was subject to 'reasonable' limitations.

[10] It was further urged that Article 82(1)(e) mandated Parliament to enact legislation for the progressive registration of citizens residing outside Kenya, and the graduated realization of their right to vote. And on that basis, counsel submitted that Parliament had enacted Section 109(1) of the Elections Act, 2011 (Act No. 24 of 2011) empowering the IEBC to make Regulations for actualising the purposes and provisions of the Elections Act. Counsel submitted that Regulation 39 of the Elections (Registration of Voters) Regulations, 2012 provides that a Kenya citizen residing abroad shall only participate in a *Presidential election* or a *referendum*. In this regard, counsel urged, the law did not permit Kenyans outside Kenya to vote in *all elective positions*.

[11] Counsel contested the Appellate Court's Order, as having the effect of amending the provisions of Regulation 39, thus encroaching upon the mandate of Parliament; for the said Regulations had been tabled before Parliament, deliberated upon, and approved. Counsel referred to the South African case, ***Lindiwe Mazibko & 4 Others v. City of Johannesburg & 2 Others [2009] ZACC 28,*** in support of the proposition that, once a right had been effected through legislation, a litigant was obliged to rely on that legislation in claiming any rights, save where he was questioning the same for being inconsistent with the Constitution. In this case, counsel urged, the constitutionality of the legislation had not been contested, and so the Court of Appeal had no basis for making the relevant Order. Counsel contested the Appellate Court's Judgment for breaching the principle of the separation of powers, as prescribed in the Constitution. Counsel cited in his client's cause, this Court's decision in ***Zachariah Okoth Obado v. Edward Akong'o Oyugi & 2 Others,*** *Sup. Ct. Civil Application No. 7 of 2014* – which sounded the Court's hesitation to usurp a mandate not bestowed upon it.

[12] Guided by the decision of this Court in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate & 4 Others*** *Sup. Ct. Petition No. 4 of 2012,* on the issue of constitutional interpretation, counsel submitted upon the constitutionality of Regulation 39 of the Elections (Registration of Voters) Regulation, 2012. He urged that the limitation to the right to vote was clear and specific, and in no way interfered with the core content of the right itself. His rationale for the limitation

was that voters in the diaspora were treated as a single electoral constituency, with the Embassies and High Commissions serving as the polling centres. In Presidential election petitions and referenda, the results are then transmitted to the National Returning Officer; and it would be practically impossible to administer the voting process for "all the elective posts." He indicated the main practical difficulties as follows: if the Court of Appeal's directions were adopted, the appellant would have to provide some 1,450 polling stations in each and every foreign State in which Kenyans were resident, to serve the existing 1, 450 County wards; and besides, the polling stations would have to be designated for each electoral area, that is, 290 constituencies as elaborated under Regulation 7(1). Counsel submitted that unmanageable complication would occur, in returning these results to the respective County, and constituency Returning Officers for declaration in terms of Regulation 84(2)(c). The delay that would be occasioned in waiting for the diaspora results to be transmitted, would probably defeat the efficiency of election-conduct mandated under Article 86(c) and (d) of the Constitution. Besides this delay, counsel submitted, the electoral set-up being proposed was not legally, practically, or even economically tenable.

[13] Learned counsel pursued the practical purpose and orientation of legislative action by citing a decision of the High Court of Lesotho, sitting as the Constitutional Court, ***Matsaseng Ralekoala v. Minister of Justice and Human Rights Law and Constitutional Affairs & 3 Others,*** *Constitutional Case No. 03 of*

2011: the principle is that the legislature is to be accorded sufficient room and scope for turning, in enacting laws to address practical needs. The Court in this case was of the opinion that such flexibility is essential, to accord the Constitution a realistic orientation, in terms of the requirements of the specific societal activity that is to be regulated. (Learned counsel urged that the same principle is to be found in the British Supreme Court case, ***Humphreys (FC) v. The Commissioner for Her Majesty's Revenue and Customs*** *[2012] UKSC 18).*

[14] Learned counsel submitted that the limitation to the exercise of voting rights is to be seen in the context of the country's electoral and political history. He cited on this point, a decision of the British Supreme Court, ***R. (On the application of Barclay and Others) v. Secretary of State for Justice & Others*** *[2009] UKSC 9*. The Court in that case was of the opinion that any electoral legislation had to be assessed in the light of the political evolution of the country concerned: so that features which would be unacceptable in the context of one system, could be justified in another; and there was no single, unvarying test.

[15] Counsel submitted that the right to vote ought to be balanced and weighed against other provisions of the Constitution; against the rights of others; and against realities obtaining in Kenya. It was urged that the limitation to the right to vote, for persons in the diaspora, was founded on valid and legitimate considerations, taking into account constitutional and societal realities in Kenya.

[16] Counsel submitted that the limitation to diaspora-voting, was by no means perverse, nor in violation of Article 27 of the Constitution, on the basis of a possible attribution of "differential treatment". He urged that Kenyans in the diaspora had, prior to the 2013 General Elections, not participated in any voting process at all; and even though the new law limits the number of elective posts in respect of which they have franchise, the Elections Act has rectified the historical condition of outright embargo on voting. Counsel urged that the right to vote did not operate in isolation, and had to be perceived in a holistic context with the guarantees of the Constitution.

(ii) The Respondents

[17] Learned counsel for the respondents, Mr. Kounah, submitted that the Court of Appeal did not negate the law, but only called for progressive realization of the right to vote for persons living in the diaspora. He submitted that the Election Regulations could be amended to give effect to the Appellate Court's Judgment. Counsel urged that, progressive realization of the right to vote was legitimate, as it did not negate legislation, and only required a graduated approach to its realization in the diaspora. He submitted that the appellant would be able to manage the electoral process, by employing electronic technology.

[18] Counsel submitted that the right to political participation was anchored in the Constitution, and the international and regional human-rights instruments. He

urged that Article 2(5) and (6) of the Constitution introduced general rules of international law and treaties and conventions ratified by Kenya, to form part of the law under the Constitution, while Article 2(4) enjoins the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms, such as the right to vote. Counsel cited Article 25 of the International Convention on Civil and Political Rights (ICCPR), as a basis of the two elements of the right to vote: a general right to take part in the conduct of public affairs, and a specific right to vote and/or be elected. Counsel urged that it was a duty incumbent upon the appellant, to ensure that this right is realized, both at home and in the diaspora. He invoked the South African case, ***Richter v. Minister for Home Affairs & 2 Others*** [2009] ZACC 3, to persuade this Court that the obligation placed upon the State is not merely that of refraining from compromising the exercise of the right, but of taking positive steps to ensure that the right is rendered unto the citizen. Counsel urged the Court to consider the aspirations of the Kenyan people for a government based on essential values, including human rights. He urged the Court to interpret the right to vote in a manner that upheld enfranchisement, as opposed to disenfranchisement, relying on the opinion of *Justice Sachs* in the South African case, ***August and Another v. Electoral Commission and Others*** *[1999] ZACC 3*. He further cited the case of ***New National Party of South Africa v. Government of the Republic of South Africa and Others****[1999] ZACC 5; 1999 (3) SA 191 (CC),* urging the Court to direct Parliament to provide machinery, mechanism or process reasonably

capable of achieving the goal of ensuring that all persons who want to vote, and who take reasonable steps in pursuit of that right, are able to do so.

[19] Counsel invoked General Comment No. 3 (Fifth Session, 1990, U.N Doc. E/1991/23 Para 9) and the obligations of States Parties under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, to advance his clients' case on the need to uphold rights, even during the motions of their progressive realization.

C. ISSUES FOR DETERMINATION

[20] Having considered the record of appeal, and the parties' submissions, it is clear to us that this appeal falls within the ambit of ***Article 163(4)(a)*** of the Constitution, and warrants this Court's further consideration, in the context of interpretation and/or application.

[21] One central issue, with two sub-issues, emerges for determination, namely –

> *whether the learned Appellate Court Judges misinterpreted and misapplied Articles 83(2), 94(1) & (5), 82(1)(e) and Article 88(5) of the Constitution, as read with Section 109(1) of the Elections Act, and Regulation 39 of the Elections (Registration of Voters) Regulations 2012, when they directed the appellant to provide for progressive*

voter registration for Kenyans living in the diaspora for ***all elective positions;***

(a) did the learned Judges fail to interpret the Constitution, the Elections Act, and the Regulations thereunder, holistically in arriving at their determination?

(b) did the learned Judges contravene Article 50(1) of the Constitution, by not allowing the appellant an opportunity to be heard on the issue of diaspora voting for all elective posts?

D. ANALYSIS

[22] Kenya is a Republic founded upon democratic principles. The right to vote is, therefore, a vital element in the laws pertaining to governance. This right, however, like other rights not designated as inalienable rights under Article 25, may be limited in the manner and form permitted under Article 24 of the Constitution.

[23] Both Superior Courts extolled the right to vote, and underlined its centrality in Kenya's current political order. The Judges of Appeal also upheld the High Court's determination that the right to vote is not, in all cases, absolute. The effect is that there is but one outstanding gravamen in the appellant's case, namely: the *progressive registration of Kenyans living in the diaspora to vote,* and *whether such registration ought to attach to all elective positions*.

[24] On the concept of progressive realization of a right, this Court did express its perception in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate***, Sup. Ct. Appl. No. 2 of 2012 as follows [Paragraph 49]:

> *"The concept of 'progressive realization' is not a legal term; it emanates from the word 'progress,' defined in the* ***Concise Oxford English Dictionary*** *as '****a gradual movement*** *or* ***development towards a destination****.' Progressive realization, therefore, connotes a* ***phased-out attainment*** *of an identified goal. The expression gained currency with the adoption of the Universal Declaration of Human Rights in 1948 – and this landmark international instrument stepped up the growth of the 'human rights movement,' worldwide. The legal milestones in this development were later marked by other instruments: such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Such instruments introduced a set of expressions that has become part of the standard language of international human rights jurisprudence. Such language entails no technicality, but is simply concerned to prescribe the extent of a State's obligation in the realization of rights embodied in the human rights Conventions"* [emphasis supplied].

[25] The Court of Appeal's direction to the appellant, to ensure that registration of diaspora-Kenyans as voters "in all elective positions" is effected progressively, in our view, did no more than express the principle of incremental progress towards a full-scale attainment of the right to vote, locally and in the diaspora.

[26] Consequently, we find little that is in departure from the terms of the Constitution, in the Appellate Court's Order which is essentially aspirational, and points to the possibility of Kenyans in the diaspora attaining the capacity to vote in elective positions other than in respect of the Presidency, or the referenda. It is not our apprehension, however, that it would be practical to decree a specific mode of exercise of diaspora voting rights in respect of "all elective positions" as from any named date.

[27] We would affirm the Court of Appeal's directions, and only add an insight from our decision in ***In the Matter of the Principle of Gender Representation*** [para 53]:

> ***"We believe that the expression 'progressive realization' is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The Exact shape of such***

measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action."

[28] The appellant ought to put in place mechanisms to ensure that voting at every election is simplified, bears assured transparency, and takes into account the special needs of persons or groups with special needs, such as Kenyans living in the diaspora.

[29] Is Regulation 39 of the *Elections (Registration of Voters) Regulations, 2012* untenable, in the circumstances? We are of the opinion that this Regulation represents the appellant's existing capacity to conduct diaspora voting, and is therefore not unreasonable. A few years ago, Kenyans in the diaspora could not actualize their right to vote; and while this right is currently limited to Presidential elections, and referenda, this limitation is inherently transient in nature. The intended object stands to be realized sooner or later, depending on developments in electronic technology, and on the due commitment of each of the relevant agencies of constitutional governance.

E. ORDERS

[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.

DATED and **DELIVERED** at **NAIROBI** this 6th day of May, 2015.

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K.H. RAWAL
DEPUTY CHIEF JUSTICE & VICE-PRESIDENT
OF THE SUPREME COURT

.....	.....
P. K. TUNOI	**M. K. IBRAHIM**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....

S. N. NJOKI
JUSTICE OF THE SUPREME COURT

I certify that this is a true

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SUPREME COURT OF KENYA