

## **BRIEF SUMMARY OF DIASPORA COURT PETITION RE VOTING & REPRESENTATION**

**PREAMBLE:** The new constitution recognizes the supremacy of the people in **Article 1**, and acknowledges Diaspora as part of the larger citizenry. Specifically, the constitution seeks to re-integrate Diaspora by providing for dual citizenship as well as their participation in the governance of the Republic. However, the Executive and Legislature have increasingly taken administrative and legislative actions that erode rather than enhance realization of the Diaspora fundamental rights enshrined in the constitution. The **Independent Electoral & Boundaries Commission (IEBC)** in particular has resisted literally every effort to ensure maximum Diaspora participation in the election of Kenya's future leaders, without satisfactory justification. This court petition is a last-resort action on the part of Diaspora, pushed down our throat by government, more so the **IEBC** and related government arms and agencies.

**PROBLEM STATEMENT:** Large sections of the Diaspora contributed significantly to the constitution re-making process, and are a major contributor to the national economy. Apart from the sustained struggle over the years to introduce **dual citizenship**, Diaspora was largely responsible for **Article 10 (National Identity, Values & Principles)**, substantial sections of **Chapter 4 (Bill of Rights)** and **Chapter 6 (Leadership & Integrity)**, among others. Not all that Diaspora recommended was taken on-board, and neither is everything in constitution pro-Diaspora. The first notable one is the failure to grant Diaspora the '**48<sup>th</sup> County**', despite concerted push. The other is the denial of dual citizens the opportunity to hold any public office<sup>1</sup>. That said, there are still several pluses the katiba has for the Diaspora that can be leveraged. Unfortunately, legislative and administrative hurdles are continually put on the way, taking away with the other hand what the katiba has given the Diaspora. Below are just examples of some of the evident actions that erode or totally overlook Diaspora as part of the wider citizenry:-

- i) Literally every law implementing the katiba has ignored the Diaspora despite the fact that public consultation (including Diaspora) is mandatory in enacting these laws. This sadly is the case even with laws

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<sup>1</sup> The irony is that this was a proposal from one of the Diaspora organizations which the **Committee of Experts (CoE)** either misunderstood or overstretched: the organization had simply suggested four very sensitive positions that should not be held by someone with split loyalty: President, Chief of the General Staff, Head of NSIS, and Head of Military Intelligence. The CoE went much further than that to include all elective public offices; certainly not the intention of the Diaspora community!

- with a direct bearing on the Diaspora, e.g. the **Citizenship & Immigration Act (2011)**;
- ii) Sections of key laws including the one above, the **Elections Act (2011)** and the **IEBC Report on Boundaries and Delimitation** (which identifies the 80 new constituencies) totally ignore the Diaspora;
  - iii) Despite the **Africa Union's** recognition and mainstreaming of Diaspora (making it its **6<sup>th</sup> Region** in a Treaty to which Kenya is signatory), having missed out on the **48<sup>th</sup> County**, and the God-sent opportunity of the new 80 constituencies based mainly on population, GoK and the IEBC in particular still didn't think it fit to allocate 9% of the total population (estimated at over **3 million** out of **38 million** total population) any representation. It is precisely for the lack of credible, all-encompassing, democratically elected representation that the Diaspora voice is mute; and
  - iv) Even for things that are largely administrative, the **IEBC** appears to hide under the provision of **Article 82 (Progressive Participation of Diaspora)** to hamper, rather than facilitate the participation of Diaspora in the coming elections, including the unrealistic requirement for Diaspora to vote only for presidential candidates, at Embassies manned by politically appointed Ambassadors & Embassy officials!

The push for Diaspora mainstreaming did not stop with inputs to the katiba; during the 2010 referendum, members of the **Kenya Diaspora Alliance (KDA)** went to court to press for registration of Diaspora and their participation in that referendum. The case was only lost on technicalities (time left was too short), but the court did direct **GoK/IEEC (now IEBC)** to ensure that adequate, timely arrangements are made in future for Diaspora participate in all national elections and referenda. Besides, Diaspora have since formally and orally submitted memoranda to countless senior officers of government, in Nairobi, at Embassies, and while senior government officials are on missions 'abroad'. Unfortunately, despite sugar-coated assurances by politicians, the IEBC and relevant legislative arms of government have ensured none of these assurances are effected (yet time is running out for the 2012/3 elections<sup>2</sup>), leaving us with no option but to seek refuge in the increasingly independent judiciary as a **last-resort**.

**PREVIOUS EFFORTS:** Some of the earliest recorded efforts to mainstream Diaspora in matters of national development started in earnest around 2000 with the push in parliament to legitimize **dual citizenship**. Of course migration started much earlier, with the famous air-lifts of the **1960's & 70's** being perhaps the most

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<sup>2</sup> In the case of representation, if we lose out, we have to wait for at least **10 years (or two elections)** before even hoping to be considered, as the boundaries review & delimitation is only done after **8 years**, and there's even no guarantee Diaspora will feature then!

prominent, not to mention earlier forced slave trade labour 'exportation'. Whereas the push in parliament for dual citizenship was defeated by a Diaspora-insensitive assembly, it set precedence for future push, driven mainly by the **Kenya Community Abroad (KCA)** in close collaboration with progressive MPs (mostly operating under the banner of the **Progressive People's Forum, PPF**). By the time of the **Bomas** constitutional effort, it was almost a foregone conclusion that **dual citizenship (DC)** would naturally form part of the new katiba. Thus it was not surprising that come 2010, this provision sailed through easily into the new katiba!

Other than these efforts, various Diaspora organizations (most of them active in a given country or city of the world) moved to galvanize Diaspora around some particular theme – often cultural (even ethnic and/or linguistic), religious, social, political, scientific/professional, educational or economic. Besides, there was 5-yearly ritual of senior politicians trooping mainly in Western capitals as part of their efforts to fundraise for elections. The Diaspora – inadvertently perhaps – became a major financier of not only the election campaigns, but also of the national economy through international remittances.

Since 2010, **KDA and its member affiliates** have consistently pushed to demand for fulfillment of Diaspora rights through court cases, official petitions, private and public dialogue with senior government officials and embassies, Diaspora conferences, sport, tourism, etc. That all these efforts (not-structured though) have not convinced the Electoral Commission to better consider the Diaspora is unfathomable, if inexcusable.

**AGREED INTERVENTION:** After profound and widespread consultations in face-to-face sessions, online forums and through regular global teleconferences, KDA members and leadership decided to proceed to court to demand for respect and upholding of their rights! It sought various legal opinions and approached several lawyers/law firms to indicate willingness, ability and readiness to take this matter up with court on behalf of the Diaspora as part of '**public interest litigation**', on pro-bono or concessionary basis. After a bit of search and consultation, the group settled on the firm **Kounah & Company Advocates**, with **Mr. James Kounah** being the **Lead Counsel**. He was introduced to KDA differently by two senior friends of the Diaspora, **Hon. Paul Muite** and **Hon. Gitobu Imanyara**.

Petitions have been drawn, reasonable fees negotiated and agreed, and we are ready to file **before mid July, 2012**, in time for the upcoming elections. Besides, KDA has formed 4 committees to assist in its push for rights fulfillment, namely: **technical (mainly electronic voting), legal, viral & media**, and **fundraising**. It is estimated that the filing and legal fees will be in the range of **KSh 1 million and above**, to get competent representation and determination. The

proposal is for the twenty or so **member organizations** to each contribute **US\$ 500**, whereas **individual members** strive to contribute each **US\$ 100** or equivalent to meet the target goals set.

**SPECIFIC PRAYERS TO COURT:** There are 4 specific prayers being tabled before the court, namely:-

- i) **Diaspora registration & voting** (seeking early/timely registration of Diaspora with sufficient provisions for registration, vetting/validation, voting and counting way beyond the Embassies currently flouted by IEBC, and also beyond 'just presidential' vote). We shall also be seeking the Honourable Court's interpretation of '**progressive**' in **Article 82** of the constitution as to whether it was meant to hamper and serve as an excuse not to involve Diaspora (as perceived by IEBC), or proactively facilitate Diaspora registration and participation (as perceived by us);
- ii) **Electronic voting (secure online/web-based and/or secure mobile text/SMS-based system)**, buoyed in part by Kenya's prowess in innovation & technology as demonstrated by pioneering mPesa and Tangaza) as the only known system to ensure maximum participation of Diaspora, given their global spread, relative sophistication, and the shrinking budget available to IEBC for the elections;
- iii) **Representation & Diaspora Constituencies:** the basis for delimitation of boundaries for pronouncement of new constituencies are, in order of priority:- **a) population, b) geography, c) community of interest**, etc. The Diaspora constitute **9%** of the total population, are spread all over the world and are certainly a 'community of interest'. They merit **5 constituencies**, one per continent. The old adage goes: **no taxation without representation!** Countries like France, Angola, South Africa, Mozambique, Cape Verde, Algeria, Iraq, etc have between 2-12 '**Diaspora constituencies**'; our premise is that Kenya's Diaspora deserve better! As a bonus, this provision may help resolve the administrative challenge of '**which county/constituency**' to register Diaspora, and therefore facilitate their participation in most, if not all elective slots rather than restricting them to only '**presidential vote**'; and
- iv) **Dual citizens:** sections of the **Citizenship and Immigration Act (2011)** take away the privileges bestowed upon dual citizens; they place non-anticipated hurdles, e.g. requiring dual citizens to wait for **10 years** before participating in elections after 'regaining' citizenship. Reclaiming citizenship/nationality should be automatic, once somebody proves he is Kenyan, and more so if he/she once had an ID and/or passport and only was prevailed upon by the then archaic laws to revoke Kenyan nationality!

**LAWYERS' PROFILE: Kounah & Co. Advocates** are registered in Kenya as Advocates and Notaries Public. It operates out of its offices in Jameson Court, Ngong Road, Kilimani Area, Nairobi, next to China Centre. Its Lead Partner, **Lawyer James Kounah** is an Advocate of the High Court of Kenya, and specializes on Corporate and Commercial Law, Immigration Law, Information Technology Law, Intellectual Property Law, Banking, Conveyancing, International Trade Law, Business Law and Civil Litigation. A copy of the Profiles of the Company and some of its Key Personnel is attached.

While Attorney Kounah will be the Lead Counsel on this matter, he will be back-stopped by several other senior and eminent lawyers, among them:- **Hon Paul Muite** (Party Leader, SAFINA and Former Long-serving Member of Parliament for Kabete Constituency), **Hon. Gitobu Imanyara** (Party Leader, Chama Cha Uzalendo & Chairman, **Pan-African Parliament's Diaspora Committee**), Senior Counsel **Pheroze Nowrojee**, renown human rights crusader and defender, among others. Both Hon. Muite and Hon. Imanyara, as part of the group better known as '**Young Turks**' were key actors in Kenya's **2<sup>nd</sup> Liberation** struggle, more so during the notorious Moi/KANU era. They have consistently continued to advocate for the rights of the down-trodden, in most cases at great risk to themselves and their families, and with little regard to ethnic balkanization. Mr. Muite is a **Presidential Candidate**<sup>3</sup> in the upcoming national elections. Mr Imanyara, for his part is the serving MP for Imenti Central (a position he has held on and off for several years) and Head of the Kenya's Delegation to the Pan-African Parliament.

It is expected as the matter progresses in court that several other prominent and pro-Diaspora lawyers will be enjoined in the matter; we shall be circulating their profiles from time to time as will be necessary.

It is noted that so far, this process has immensely benefited from **professional counsel** from several leading lawyers and law firms (for which we are greatly indebted), among them: **Kituo Cha Sheria**, Senior Counsel **Aurelio Rebelo**, **Dr Ekuru Aukot** (Chief Spokesperson, **G47** and Former Executive Director, Committee of Experts), **Priscilla Nyokabi** & **Gertrude Angote** (both of Kituo Cha Sheria), Senior Counsel **Nyamogo Ochieng' Nyamogo**, **Charles Kanjama** (he graciously led Diaspora's petition during the last referendum), **Donald Rabala**, **Collins Adipo**, **Advocate Omangi**, **Jackson Onwong'a**, and **Evans Machera**, among others. Their inputs greatly inspired, motivated and re-energized our resolve and pursuit of this course for '**justice for all**', including Diaspora.

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<sup>3</sup> This engagement is purely professional, and in no way implies tacit support or endorsement of candidature! A Resume for Hon Muite is also attached.

**ESTIMATED LEGAL & RELATED FEES:** Initial cost indications ranged from **'free' (pro-bono)**, **KSh 300,000** to **KSh 1.5 million**. Price is not everything! After various extensive consultations and considerations, KDA settled on this law firm, mainly because of its grasp of the issues at hand, its pro-Diaspora stance and very pocket-friendly proposition. It asked for a modest deposit of **KSh 200,000** for research, filing, etc – and a further **KSh 150,000** as top up once the case is over (one way or other), making their cost nominally **KSh 350,000**. Given the high caliber of lawyers in the house, this is certainly a 'give a way', for which we are most grateful. Nonetheless, apart from the main front-office counsel, Mr. Kounah, a cadre of other senior and mid-level lawyers will constitute the 'larger team'. We estimate that a token of **KSh 100,000** per additional lawyer would be reasonable, and we purpose that there will be such **5-6 lawyers**. Plus other overheads, e.g. media and online campaigns, and logistics, we put our expense cap at **KSh 1 million**.

Depending on how the court matter goes, the actual fee may slightly vary, but should largely be in the range stated. Prudent financial management shall be ensured as funds shall be remitted through a Joint Bank Account operated collectively by 3 senior KDA members on the ground.

In a worst case scenario, the court may rule against us and impose legal fines (e.g. for us to pay **Respondents' legal fees**). However, this is unlikely, but we must be prepared for the worst. This is a course we are prepared to see through until Diaspora is fully anchored among the homeland patriots as should be the case.

**PROPOSED FUNDRAISING STRATEGY:** KDA is largely a corporate membership organization, with a few individual members, mostly opinion leaders in their own jurisdictions. We plan to raise half of the targeted fees from the corporate members, and the other half from individual members and well-wishers.

If, for instance, each of the 20 targeted organizations raise at least **US\$ 500** as the goal set, we would have in total US\$ 10,000 = KSh 820,000. In the same vein if each of the estimated 100 eminent/individual members each contribute **US\$ 100**, we should raise a further US\$ 10,000 = KSh 820,000. In reality, however, a few will raise more, but many will raise less. Assuming a 70% positive, timely and flawless response, this should raise for the legal campaign:-

**KSh 574,000** from organizations/corporate members, and  
**KSh 574,000** from individual members, concerned Diaspora,  
Diaspora friends, and well wishers.

Total estimated **KSh 1+ million (precisely KSh 1,048,000)**

Should there be any surpluses, KDA's leadership in consultation with the contributors will decide in a transparent manner what to use it for, but most likely in any necessary follow-up litigation or related expenditure, fines or overheads. If on the other hand there is a short-fall, the leadership will revert to the generous contributors with a further begging bowl. All these will be done with utmost transparency, accountability and good governance.

**WAY FORWARD:** The lawyers have been given the go ahead to assemble the bundles, draw up the complaints and the affidavits, and proceed to file the same at the earliest opportunity. As a sign of good faith and commitment, it is desirable to pay the **deposit of KSh 200,000** upfront. It is commendable that from the onset, contributions mainly by some of the KDA leaders and outstanding opinion leaders have already paid and/or pledged a total sum of **KSh 90,000**. As we mount a viral/media campaign both to elevate the profile of this case, and secondly, to facilitate awareness and the fundraising exercise, it is our hope that all Diaspora and friends of Diaspora will stand and join us by contributing one way or the other to ensure that the rights of these Kenyans (like any other) are not unnecessarily trampled on. Apart from material or in-kind contribution, you are called upon to '**spread the word**' and keep the pressure on wherever you are, whatever your station in life, whenever the opportunity arises! You are also welcome to serve as a volunteer in any of the 4 'technical committees'.

All contributors, small or big will be appropriately acknowledged in all our communications.

**CONCLUSION:** We have this legal battle which has been pushed upon us by insensitive leadership, not known to be mindful of its citizenry. The new katiba gives us a unique opportunity to work with other Kenyans to restore the people's supremacy, and ensure that moving forward, no Kenyan or group of Kenyans shall once again be taken for granted. It is our prayer that the honourable court/s we appear before shall truly uphold the letter and spirit of our national anthem, and ensure '**that justice be our shield and defender**'.

Thank you, *na ahsante sana!*

**\*\*\*\*\* LATEST UPDATE \*\*\*\*\***

On 3<sup>rd</sup> August, 2012, the Lawyers formally filed the petition in the High Court of Kenya. Unfortunately, the Court went on vacation the following day, but gave a mid September date for hearing. Consultations are on-going to see if the Duty Judge could deal earlier, given the urgency of time.

**\*\*\*\*\* End of Update \*\*\*\*\***

**All payments should preferably be made directly into the recommended bank accounts of KDA representatives and/or member organizations (to be circulated)!**