

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO..... OF 2012

IN THE MATTER OF ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 38(3) (a) & (b) OF THE CONSTITUTION OF
KENYA

AND

IN THE MATTER OF ARTICLES 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 THE REPUBLIC OF KENYA

AND

IN THE MATTER OF RULE 3 & 17 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND
ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES
2012 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

AND

IN THE MATTER OF ARTICLE 25 (a) (b) and (c) OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF ARTICLE 2(1) OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF ARTICLE 13 (1) AND (2) OF THE AFRICAN (BANJUL)
CHARTER ON HUMAN AND PEOPLES' RIGHTS

AND

IN THE MATTER OF ARTICLE 21 OF THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS

BETWEEN

NEW VISION KENYA (NVK MAGEUZI).....1ST PETITIONER
KENYA DIASPORA ALLIANCE.....2ND PETITIONER
DR. SHEM ODONGO OCHUODHO.....3RD
PETITIONER
MR GICHANE MURAGURI.....4TH PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....	1 ST RESPONDENT
MINISTER FOR STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS.....	2 ND RESPONDENT
MINISTER FOR FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION.....	3 RD RESPONDENT
THE ATTORNEY GENERAL.....	4 TH RESPONDENT
THE MINISTER FOR JUSTICE, NATIONAL COHESION & CONSTITUTIONAL AFFAIRS.....	5 TH RESPONDENT
THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS	INTERESTED PARTY

PETITION

TO:
The High Court of Kenya;
Nairobi.

The Humble Petition of **NEW VISION KENYA (NVK MAGEUZI), KENYA DIASPORA ALLIANCE, DR. SHEM ODONGO OCHUODHO and MR GICHANE MURAGURI** who bring this Petition as a matter of public Interest and whose Address of Service for purposes of this Petition is care of **Kounah & Company Advocates, Jameson Court, Block D, 2nd Floor Suite 11, Ngong Road, P.O. Box 8035-00200 NAIROBI.** Is as follows;

Jurisdiction

The Petitioners bring this suit as a matter of Public Interest under Articles 22 (2) and 258 (2) (c) of the Constitution of Kenya and thus this Honorable Court has jurisdiction over all the claims for relief sought herein under Article 22 and 23 of the Constitution.

The Parties

1. The 1st Petitioner is a duly registered trust in the Republic of Kenya and champions the rights of the Kenyan citizens in the Diaspora.
2. The 2nd Petitioner is an umbrella body of various Diaspora organizations which represent and champion for the rights and interests of Kenyan citizens living in the Diaspora all over the world.
3. The 3rd Petitioner is a Kenyan citizen living in the Diaspora, he is a Trustee and Chairman of the 1st Respondent which is also a founding member of the 2nd Respondent. He is also Interim Convener of the 2nd Respondent.
4. The 4th Respondent is a Kenyan citizen who has lived in the Diaspora, mainly Canada and United States of America (USA), for nearly 20 years. He is a Trustee and Past President of the Kenya Community Abroad (KCA), a Member organization of the 2nd Respondent, and also a founding member of the 1st Respondent.

The Petitioners bring this suit as a matter of Public Interest seeking relief for threats to the fundamental rights of Kenyan Citizens living in the Diaspora to be registered as voters and their right to vote and seek elective office in the forthcoming general elections.

These imminent threats are caused by the actions of the Respondents and thus this Honorable Court has jurisdiction over all the claims for relief sought herein under Article 22 and 23 of the Constitution of Kenya 2010. The Petitioner's address of service for purpose of this Petition is care of **Kounah & Company Advocates, Jameson Court, Block D, 2nd Floor Suite 11, Ngong Road, P.O. Box 8035-00200 Nairobi.**

5. The 1st Respondent is a Commission established under Article 88 (1) of the Constitution whose functions are as outlined under Article 88 (4) as being responsible for conducting and supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament and in particular for the continuous registration of citizens as voters, the regular revision of the voter's roll, the delimitation of constituencies and wards, the registration of candidates for elections and the facilitation of the observation, monitoring and evaluation of elections amongst other functions.

The 1st Respondent is sued for its failure to ensure the realization of the right of Kenyan Citizens in the Diaspora to be registered as voters and to exercise their right to vote and seek elective office in the forthcoming general elections, pursuant to Article 38 (3) (a) and (b) of the Constitution of Kenya 2010. Its address of Service for the purpose of this Petition is **University Way, Anniversary Towers, 6th Floor, and P.O. Box 45371 - 00100 Nairobi.**

6. The 2nd Respondent is the Minister in the Ministry of State for Immigration and Registration of persons whose functions are to ensure Identification and registration of all Kenyan citizens who have attained the age of eighteen (18) years and above, Production and issuance of secure identification documents, Management of a comprehensive database of all registered persons, and Detection and prevention of illegal registration.

The 2nd Respondent is enjoined in this Petition for its failure to enforce the Registration of Persons Act (Cap 107), Laws of Kenya, which provides for the compulsory registration and issuance of Identity Cards to all Kenyans who have attained the age of 18 years and above. The possession of Identity Cards by Kenyans in the Diaspora is a prerequisite to their registration as voters. Its address of Service for the purpose of this Petition is **Nyayo House, Kenyatta Avenue and P.O. Box 45371 - 00100 Nairobi.**

7. The 3rd Respondent is the Minister in the Ministry of Foreign Affairs and International Cooperation whose function is to oversee Kenya's foreign policy, State and official visits, protocol and consular matters and provides services to Kenyans in the Diaspora. Its address of service for the purpose of this Petition is P.O. Box 30551 - 00100 Nairobi, Kenya. Harambee Avenue.

The 3rd Respondent is sued for its failure to advise the Kenyan government and the 1st Respondent on the participation of Kenyan's in the Diaspora and their rights to be registered as voters and to vote and or seek elective office in national elections.

8. The 4th Respondent is the Attorney General of the Republic of Kenya. He is joined to this Petition as Respondent pursuant to the provisions of Article 156 of the Constitution of the Republic of Kenya in his capacity as:
 - a. The principal legal adviser to the Government of the Republic of Kenya.
 - b. The person authorized by law to represent the National Government in court or in any other legal proceedings to which the national government is a party.
 - c. The officer of government under a duty to promote, protect and uphold the rule of law and defender of the public interest.
 - d. The office responsible for decisions, acts and omissions of the officials of the 1st and 3rd Respondent on Affairs concerning the subject matter of this Petition. His address of service for purposes of this Petition is care of, **Hon. Attorney General's Chambers, Sheria House, Harambee Avenue, and P.O. Box 40112-00100, Nairobi.**

9. The 5th Respondent is the Minister in the Ministry of Justice, National Cohesion and Constitutional Affairs whose mandate is to implement policies on behalf of the government on matters touching on the constitutional rights of the Kenyan citizens. Its mission statement reads "To provide Coordination and facilitation for the full enjoyment of the fundamental rights and freedoms through the creation of an enabling constitutional orders, the promotion of democracy nurturing a responsive and fair system of justice for all and sustaining a coherent anti corruption culture".

It is sued for its failure to carry out its mandate *vis a vis* the rights of the Kenyan Citizens in Diaspora in enjoyment of their political rights to participate in the democratic process in Kenya.

The 2nd Respondent is sued for his failure and /or neglect to advise the 1st Respondent on its duty to ensure that the rights of Kenyan Citizens in the Diaspora are respected, protected, realized and fulfilled; specifically their fundamental rights to be registered as voters and the right to vote in the forthcoming general elections. By failing and or neglecting to do so, the 2nd Respondent is in

contravention with Article 3 and Article 156 of the Constitution which obligates every person to respect, uphold and defend the Constitution; and this includes the Respondents. Its address of Service for the purpose of this Petition is **State Law Office, Sheria House, Harambee Avenue, Nairobi.**

The Constitutional Foundations of the Petition

10. **The Preamble to the Constitution of Kenya** recognizes the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law and the exercise by the people of Kenya of our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution. The 1st Petitioner fully participated in the constitution making process and received a commendation letter from the Committee of Experts having contributed in writing substantially to Article 10, Chapter Six and the Bill of Rights especially Diaspora rights, among others.
11. **Article 1 (1)** of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
12. **Article 1 (2)** of the Constitution provides that the people may exercise their sovereign power either directly or through their democratically elected representatives.
13. **Article 2(1)** of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds ***“all persons and all State Organs at both levels of government”***.
14. **Article 2(5)** of the Constitution provides among other things that any act or omission in contravention of the Constitution is invalid.
15. **Article 2(6)** of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this Constitution.
16. **Article 3** of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
17. **Article 10** of the Constitution of the Republic of Kenya sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy decisions. The national values and principles of governance include **the rule of law, equity, inclusiveness, equality, human rights, Non-discrimination, good**

governance, transparency, accountability, democracy and participation of the people.

18. **Article 14(1)** of the Constitution of the Republic of Kenya avers that a person is a citizen by birth if on the day of that person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen, bestowing automatic citizenship upon citizens with dual nationalities who may have lost their Kenyan citizenship on the basis of the former Constitution which outlawed dual citizenship.
19. **Article 19** provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.
20. **Article 20** applies the Bill of Rights to all law and binds all state organs and all persons, and, further obligates this Honorable Court, in interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom, and, the spirit, purport and objects of the Bill of Rights. The same article also requires of this Honorable Court, in applying a provision of the Bill of Rights to adopt the interpretation that most favors the enforcement of a right or fundamental freedom.
21. **Article 21** of the Constitution provides that it is a fundamental duty of the State and every State Organ to observe, respect, promote, and fulfill the rights and fundamental freedoms in the Bill of Rights. This includes the duty of the State to enact, implement and fulfill its international obligations in respect of human rights and fundamental freedoms.
22. **Article 22 (1)**, read together with **Article 258 (1)** gives every person the right to institute court proceedings claiming the right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. **Article 22 (2) and Article 258 (2)** provides that in addition to a person acting in their own interest, court proceedings under clause 1 may be instituted by:
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
23. **Article 23** vests authority in this Honourable Court to uphold and enforce the Bill of Rights and highlights some of the remedies that this Honourable Court can grant to uphold and enforce the Bill of Rights.

24. **Article 27** of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. It especially holds that equality includes the full and equal enjoyment of all rights and fundamental freedoms and that the State shall not discriminate directly or indirectly against any person on any ground.
25. **Article 38 (3) (a) and (b)** provides that every adult citizen has the right, without unreasonable restrictions - to be registered as a voter and to vote by secret ballot in any election and referenda.
26. **Article 81 of the Constitution** provides that the electoral system shall comply with the following principles:
- a. Freedom of citizens to exercise their political rights under **Article 38**
 - e. free and fair elections
27. **Article 82 (1) (c) and (e)** of the Constitution provides that parliament shall enact legislation to provide for - The continuous registration of citizens and voters and for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.
28. **Article 83 (1)** of the Constitution provides that a person qualifies for registration as a voter at elections or referenda if the person is an adult citizen.
29. **Article 83 (3)** of the Constitution provides that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.
30. **Article 88** of the Constitution establishes the Independent Electoral and Boundaries Commission and sub Article 4 states that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament, and in particular - **the continuous registration of citizens as voters, the delimitation of constituencies and wards** and the facilitation of the observation, monitoring and evaluation of elections amongst other functions.
31. **Article 88 (5)** of the Constitution obligates the IEBC to exercise its powers and perform its functions in accordance with the Constitution and national legislation.
32. **Article 165 (3) (b)** of the Constitution establishes the jurisdiction of the High Court as to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

33. **Article 249 (1) and (2)** of the Constitution provides that the Objects of the commissions and the independent offices are to—

- (a) protect the sovereignty of the people;
- (b) secure the observance by all State organs of democratic values and principles; and
- (c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

- (a) are subject only to this Constitution and the law; and
- (b) are independent and not subject to direction or control by any person or authority.

34. **Article 259** of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and **contributes to good governance**.

Other Legal Foundations of the Petition

35. **Section 4 of the Independent Electoral Boundaries and Commission Act** provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards using appropriate technologies and approaches amongst other functions.

The Facts

36. According to the Central Bank of Kenya and World Bank Report 2010, an estimated over three (3) million Kenyans are presently domiciled in other countries and contribute a lot to the socio-economic, technological and cultural development of the country. This totals to an approximate of about 9 percent of the current population. 2010 at \$1.8 billion, about 20 per cent of Kenya's current annual budget.

37. The Kenyans in the Diaspora each possesses the right to participate in the affairs of their country and in particular the right to be registered as a voter and the right to vote and/or seek elective office in the forthcoming general elections.

38. The Kenyans living in the Diaspora have continuously agitated for their rights as per several petitions they made to the 1st Respondent

and other government bodies towards the realization of their right to vote in national elections and referenda.

39. The Independent Electoral and Boundaries Commission was established under the Independent Electoral and Boundaries Commission Act, Cap 9 of 2011 its role is as provided for by Article 88(4) of the Constitution, responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
 - a) the continuous registration of citizens as voters;
 - b) the regular revision of the voters' roll
 - c) the delimitation of constituencies and wards in accordance with the Constitution, amongst other functions.
40. The Petitioners are fully aware of the budgetary constraints to the 1st Respondent in the conduct of the elections, and equally acutely aware of electronic voting for Diaspora being the known most cost effective and secure method, and that several such electronic voting systems or their prototypes have already been demonstrated to and/or brought to the attention of the 1st Respondent.
41. The 1st Respondent has, in its recent planning of the upcoming elections, omitted, overlooked and/or ignored the provision for registration and therefore participation of Kenyan citizens in the Diaspora in the forthcoming presidential elections and other future elections and referenda.
42. The implication of this is that not adequate voter registration will be conducted outside Kenya for the benefit of Kenyan citizens resident in countries outside Kenya and as such, most will not vote in the forthcoming elections.
43. The Petitioners aver that several attempts have been made by a number of Kenyans in the Diaspora and other citizens to have the 1st Respondent factor in their concerns of creating registration and polling centers for the benefit of the Kenyans in Diaspora, to no avail.
44. The Petitioners take great exception that the general lethargy to enable the Diaspora to fully participate in the elections is in total disregard to orders from an earlier ruling of the Honourable court that directed the 1st Respondent and its predecessors to ensure necessary timely arrangements are made to ensure the Diaspora are given sufficient opportunity to participate in all future national elections and referenda.
45. The prayers before the Honourable court are a practice already common in many progressive jurisdictions, including Algeria, Angola, Australia, Cape Verde, Estonia, France, Holland, Mozambique, South Africa, UK, USA, among others. Indeed, the African Union itself has

since recognized the Diaspora as an important constituency and formally assigned it as the 6th Region in a Treaty to which Kenya too is signatory.

Violations of their fundamental rights and fundamental freedoms

46. The acts and/or omissions of the 1st Respondent to deny Kenyans in the Diaspora sufficient opportunity to register voters and to subsequently vote and/or seek elective office violates the fundamental right of the citizens in the Diaspora to be registered as voters and their right to vote and/or seek elective office in the forthcoming general elections captured in Article 38(3) (a) and (b) of the Constitution of Kenya 2010.
47. This act and/or omission of the Respondents further violates Article 82 (1) (c) and (e) of the Constitution of Kenya 2010 which provides for the registration of citizens residing outside Kenya and the realization of their right to vote.
48. The acts and/or omissions of the 1st Respondent are discriminatory in nature and in essence contrary to the right to equality and freedom from discrimination protected by Article 27 of the Constitution. Most Kenyans in the Diaspora are citizens of this country and the denial of their right to be registered as voters and by implication the right to vote and/or seek elective office is barefaced discrimination as they are denied equal enjoyment of their fundamental rights and freedoms with the nationals who reside in Kenya.
49. The act and/or omission of creating sufficient registration and polling centres to cater for registration of voters in countries outside Kenya and/or in the alternative making provisions for electronic voting is a blatant infringement of **Article 83(3)** of the Constitution which clearly states that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate and shall not deny an eligible citizen the right to vote or stand for election. If left unchecked and without the intervention of the court, the present mechanism, will deny Kenyan citizens in the Diaspora their right to vote and/or seek elective office for a long time to come.
50. The act and/ or omission by the 1st Respondent in provision for the opportunity of registration and voting for persons in the Diaspora goes against the Preamble to the Constitution which vests in the people of Kenya the exercise of their sovereign and inalienable right to determine the form of governance of the country.
51. Furthermore, the 1st Respondent's published report vitiates Article 249 of the Constitution on the objects of the Commissions, specifically the object to protect the sovereignty of the people and to promote constitutionalism.

52. **Article 8(4) of Citizenship & Immigration Act (2011)** which not only makes it mandatory for Kenyans with dual citizenship to reapply and register to reclaim citizenship, but also imposes a hefty fine of not exceeding KSh 5 million and/or 3 years imprisonment for failure to declare dual citizenship in a prescribed manner is unconstitutional.

53. The acts and/or omissions of the Respondents are against the guarantees under the Kenyan Constitution 2010 and which are also protected under International law as guaranteed by Article 2(6) of the Constitution. When interpreting the domestic provisions, reference ought to be given to the international law and precedent.

Your Petitioners therefore humbly seek the following prayers:-

- a) A declaration that Kenyan citizens in the Diaspora possess a fundamental and an 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 (e) of the Constitution which provides for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.
- c) A declaration that 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 mechanisms 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 centers 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 Honorable Court shall deem just and fit to grant.

DATED at Nairobi this.....day of.....2012

KOUNAH & COMPANY
ADVOCATES FOR THE PETITIONERS

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To be served upon:

1. The Independent Electoral and Boundaries Commission,
University Way, Anniversary Towers, 6th Floor,
NAIROBI.
2. The Minister For State For Immigration And Registration Of Persons
Nyayo House,
Kenyatta Avenue,
NAIROBI
3. The Minister For Foreign Affairs and International Cooperation,
Ministry of Foreign Affairs Building,
Harambee Avenue,
NAIROBI
4. The Attorney General
State Law Office,
Harambee Avenue,
NAIROBI.
5. The Minister for Justice, National Cohesion and Constitutional Affairs
State Law Office,
Harambee Avenue,
NAIROBI.

6. THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS COMMISSION

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48, 50, 81, 82, 83, 88, 89, 159, 165, 249, 258, & 259 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF RULE 11 & 12 (SUPERVISORY JURISDICTION AND
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006) AND
ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF ARTICLE 25 OF THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF ARTICLE 1 OF THE OPTIONAL PROTOCOL TO THE
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

AND

**IN THE MATTER OF ARTICLE 2(1) OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

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**IN THE MATTER OF ARTICLE 13 OF THE AFRICAN (BANJUL) CHARTER ON
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BETWEEN

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AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

MINISTER FOR STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS.....2ND RESPONDENT

MINISTER FOR FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION.....3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT
THE MINISTER FOR JUSTICE, NATIONAL COHESION & CONSTITUTIONAL AFFAIRS.....5TH RESPONDENT
THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS COMMISSION.....INTERESTED PARTY

SUPPORTING AFFIDAVIT

I, DR. SHEM ODONGO OCHUODHO, a resident of Juba in the Republic of South Sudan and of P O Box Number33 Juba in the aforesaid Republic do hereby make oath and state as follows:

1. THAT I am a male adult of sound mind, the 3rd Petitioner herein, a Trustee and Chairman of the 1st Petitioner and I am duly authorized by the 2nd Petitioner to swear this affidavit on its behalf. I annex and mark as exhibit 'SOO 1' a true copy of the authority to institute these proceedings.
2. THAT I am duly conversant with the matters pertaining to this Petition hence I am competent to swear this affidavit on behalf of all the Petitioners.
3. THAT the 1st Petitioner is a duly registered Trust and a founding member of the 2nd Petitioner. I annex and mark as exhibit 'SOO 2' a true copy of the Trust Deed/Certificate of Registration.
4. THAT the Petitioners bring this suit for their own individual and collective interest and as a matter of Public Interest under Articles 22 (2) and 258 (2) (c) of the Constitution of Kenya seeking relief for threats to the

fundamental rights of Kenyan Citizens living in the Diaspora to be registered as voters and their right to vote and seek elective office in the forthcoming general elections.

5. **THAT** I am aware that the Respondents were directed by this Honourable Court vide Petition Number 3 of 2010 to put in place mechanisms for the registration of the Diaspora as voters to enable them to participate in the electoral process in the country to achieve progressive registration. I annex hereto and mark as exhibit 'SOO 3' a true copy of the Judgment.
6. **THAT** I am also aware that the 1st Respondent has failed and or refused to implement and or put in place mechanisms to enable the Diaspora all over the world to register as voters and participate in the electoral process as enshrined in the Constitution of Kenya 2010.
7. **THAT** further the 1st Respondent has only named some of the Embassies, High Commissions and Missions as centers for registration of the Diaspora as voters and this is not in line with the guarantees of the Constitution and the International instruments on political rights of the Diaspora.
8. **THAT** it is noteworthy that the Embassies, the High Commissions and Missions are far flung and it would be very costly and almost impossible for many citizens in the Diaspora to register due to transport and other logistical hardship.
9. **THAT** the 1st Respondent has been abdicating or hiding under the progressive realization under Article 82(1)(c) and (e) of the Constitution of Kenya 2010.
10. **THAT** I have been advised by my advocates which advise I verily believe to be true that the Kenyan citizens in the Diaspora have an equal right with the Kenyan citizen within the boundaries of the Republic of Kenya to be registered as voters and to participate in the electoral process. That this inalienable right of Kenyan citizens living in the Diaspora will be grossly violated by the Respondents by denying them or failing to provide mechanisms to facilitate easy access to registration centers and or implementation of electronic voter registration through secure online and/or protected mobile phone texting system.
11. **THAT** I have been further advised by my advocates which advise I verily believe to be true that the violation of the Kenyan citizens living in the Diaspora will be furthered or continue to be perpetuated by the failure to factor in and or take into consideration the population density in certain areas and or regions in the Diaspora. This would be prevented by taking into account the number of voter registration centers and/or implementation of online, mobile phone texting or electronic registration and voting.
12. **THAT** the aforementioned violations of the rights of the Kenyans living in Diaspora is directly caused by the failures of the 2nd, 3rd and 4th Respondents who have failed to protect the said rights by failing to undertake their mandate *vis a vis* the rights of the Kenyan Citizens living in Diaspora.

13. **THAT** I have been further advised and it has been widely reported in the mainstream media that the 1st Respondent is borrowing machinery for voter registration and voting from the neighboring countries in preparation for the next general elections. I am also advised that the same can be applied in the Diaspora and/or friendly development partners or United Nations Agencies can be approached to offer logistical support to enable easy access for voter registration and voting.
14. **THAT** I know from my knowledge that the Republic of South Sudan conducted its voter registration and voting of its citizens living in Kenya by setting up centers in Nairobi, Nakuru, Eldoret, Dadaab among other centers, whereas the Kenyans living in the Diaspora in the Republic of South Sudan do not have voter registration and voting centers yet being a much larger territory than Kenya it will be more inhibitive for prospective votes to travel for instance from Aweil or Malakal to the capital city Juba to register and or vote. Further Kenyan citizens living in countries such as the United States of America are being denied their political rights to register and participate in the electoral process because the only voter registration is at the Kenyan Embassy which only has offices in Washington DC, New York and Los Angeles. Equally worrisome, Kenyans in the entire West African Region regardless of country of domicile will need to travel to Abuja, Nigeria, to register and or vote; the same fate faces Kenyans in the vast Oceania and the Pacific Ream all who would have to travel to Canberra, Australia to register and or vote, and so on.
15. **THAT** bearing in mind that Kenyan citizens living in the United States of America and other countries are far flung and with a presence in all the States it will be impossible for almost $\frac{3}{4}$ of them to participate in the voter registration and or voting exercise come the next general elections if the registration and election will be carried out only at the Embassies, High Commissions and Missions.
16. **THAT** I have been advised and I know of my knowledge that the Kenyan citizens living in the Diaspora have petitioned different government officials including the Chairperson and Commissioners of the 1st Respondent to heed to their plight and set up more voter registration centers, including mobile centers, as opposed to the Embassies, High Commissions and Missions or use the cheaper and more reliable electronic voting option but no action has been taken.
17. **THAT** I have been advised and I know of my own knowledge that some of the Embassies, High Commissions and Missions' employees are headed by political appointees by the government and as such are not independent but affiliated to political parties. That this is in violation of the electoral rules which require that voter registration and election exercise be undertaken by independent officials.
18. **THAT** I have been further advised by my advocates aforementioned that unless this Honourable Court comes to the aid of the Petitioners and Kenyan Citizens living in the Diaspora and compels the Respondents to enforce the rights guaranteed under the Constitution the gross, blatant violation of their rights will continue to be visited upon them.
19. **THAT** these imminent threats are caused by the actions and omissions of the Respondents and this Honourable Court has jurisdiction over all the

claims for relief sought herein under Article 22 and 23 of the Constitution of Kenya 2010.

20. **THAT** I am advised by my advocates on record and which advice I believe is correct that the 1st Respondent, the Independent Electoral and Boundaries Commission (herein after IEBC) is established under Article 88 (1) of the Constitution and its functions as outlined under Article 88 (4) include *inter alia* the continuous registration of citizens as voters and the regular revision of the voter's roll.
21. **THAT** the IEBC has since failed, refused and/or neglected to ensure the realization of the right of Kenyan Citizens in the Diaspora to be registered as voters and their right to vote in the forthcoming general elections, pursuant to Article 38 (3) (a) and (b) of the Constitution.
22. **THAT** the Honorable Attorney General is sued in this Petition as Respondent in his capacity as:
 - a. The principal legal adviser to the Government of the Republic of Kenya;
 - b. The person authorized by law to represent the National Government in court or in any other legal proceedings to which the national government is a party;
 - c. The officer of government under a duty to promote, protect and uphold the rule of law and defender of the public interest; and
 - d. As an interested party having represented the 1st Respondent in the Court Matter sited above in defense against the Kenyans in the Diaspora he is unlikely to give government credible, independent and professional advice on this matter
23. **THAT** the 4th Respondent has failed refused and/or neglected to advise the 1st 2nd and 3rd Respondents on their duty to ensure that the rights of Kenyan Citizens in the Diaspora are respected, protected, realized and fulfilled; specifically their fundamental rights to be registered as voters and the right to vote and seek elective office in the forthcoming general elections. By failing, refusing and/or neglecting to do so, the 4th Respondent is in contravention of his constitutional mandate.
24. **THAT** it is well within my knowledge that the Constitution provides that every adult citizen has the right, without unreasonable restrictions, to be registered as a voter and vote by secret ballot in any general election or national referendum.
25. **THAT** the Constitution also provides that a citizen by birth does not lose citizenship merely by acquiring the citizenship of another country.
26. **THAT** it is within my knowledge that an estimated over three (3) million Kenyans are presently domiciled in other countries and contribute substantially to the socio-economic, technological and cultural development of the country. This totals to an approximate of about 9 percent of the current population. These Kenyans each possesses the right to participate in the affairs of their country and in particular the

right to be registered as voters and the right to vote and seek elective office in the forthcoming general elections.

27. **THAT** the 1st Respondent's Constitutional mandate described in Article 89(3) of the Constitution is to review the names, number and boundaries of wards.
28. **THAT** in exercising that constitutional mandate, the Independent Commission started reviewing and delimiting boundaries of constituencies and wards in the year 2011 and on 7th March 2012, the Commission published its report titled "*The Report on Delimitation of the National Assembly Constituencies and County Assembly Wards*".
29. **THAT** the aforementioned report blatantly omitted the provision for electoral boundaries in the Diaspora for Kenyan citizens living outside Kenya to exercise their right to vote and or seek elective office, and thus silent on the registration and therefore participation of Kenyan citizens in the Diaspora in the forthcoming general elections.
30. **THAT** the implication of this omission is that voter registration will not be conducted outside Kenya for the benefit of those Kenyans resident or domiciled in those countries and that as a result most will not vote and or seek elective office in the forthcoming general elections.
31. **THAT** several attempts have been made by a number of Kenyans in the Diaspora and other citizens to have the 1st Respondent factor in their concerns of creating electoral units for the benefit of this group of people to no avail. (Annexed and marked "SOO 4" is a copy of the Memorandum sent to the 1st Respondents)
32. **THAT** I am advised by my advocates on record that the timeline for reviewing the decision of the 1st Respondent lapses after thirty (30) days from the date of publication of the aforementioned report, that is on 7th April 2012, and this court should intervene to stop the imminent violation of constitutional rights of Kenyans living in the Diaspora.
33. **THAT** the acts and/or omissions of the Respondents to exclude the delimitation of boundaries for Kenyans in the Diaspora to be registered as voters and to subsequently vote is a threat to the fundamental right of the citizens in the Diaspora to be registered as voters and their right to vote and or seek elective office in the forthcoming general elections captured in Article 38(3) (a) and (b) of the Constitution of Kenya 2010.
34. **THAT** this act and/ or omission of the 1st Respondent further threatens to violate Article 82 (1) (c) and (e) of the Constitution of the Republic of Kenya 2010 which provides for the progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.
35. **THAT** by virtue of Article 89 (2) of the Constitution, the same sad situation will be retained even after the coming general elections and extended to the general elections of the year 2017. The import of this Article is that the Commission will not review the boundaries for at least eight years therefore the next year (probably) when the 1st Respondent may review the boundaries is after the year 2020 meaning that the right

of citizens living in the Diaspora to vote and have their own representatives may well not be realized in the general elections of 2017.

36. **THAT** the acts and/ or omissions of the 1st Respondent are discriminatory in nature and in essence contrary to the right to equality and freedom from discrimination protected by Article 27 of the Constitution. Most Kenyans in the Diaspora are still citizens of this country and the denial of their right to be registered as voters and by implication the right to vote and or seek elective office is barefaced discrimination as they are denied equal enjoyment of their fundamental rights and freedoms with the citizens who reside in Kenya.
37. **THAT** furthermore, Article 14 and 15 of the Constitution clarifies the requirements and conditions of citizenship and as such, the people resident or domiciled outside the country nonetheless qualify under these requirements and conditions should be given the opportunity to exercise their fundamental rights and freedoms just like other Kenyans.
38. **THAT** the act and/or omission of delimiting electoral boundaries to cater for registration of voters in countries outside Kenya is a blatant infringement of Article 83(3) of the Constitution which clearly states that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate and shall not deny an eligible citizen the right to vote or stand for election. If left unchecked and without the intervention of the court, the present mechanism will deny Kenyan citizens in the Diaspora their right to vote and the omission of this in the report extends the imminent violations.
39. **THAT** this further goes against the Preamble to the Constitution which vests in the people of Kenya the exercise of their sovereign and inalienable right to determine the form of governance of the country and its people.
40. **THAT** furthermore, the 1st Respondent's published report vitiates Article 249 of the Constitution on the objects of the Commissions, specifically the object to protect the sovereignty of the people and to promote constitutionalism.
41. **THAT** the acts and/or omissions of the 1st Respondent go against the guarantees under the Kenyan Constitution and which are also protected under international law and that when interpreting the domestic provisions, reference ought to be given to the international law and precedent to explain and interpret what the Constitution means.
42. **THAT** what together with the Co-Petitioners we are praying to the court is a practice already common in many progressive jurisdictions, including Algeria, Angola, Cape Verde, France, Mozambique, South Africa, among others. Indeed, the African Union itself has since recognized the Diaspora as an important constituency and formally assigned it as the 6th Region in a Treaty to which Kenya too is signatory.
43. **THAT** I believe this Honourable Court has the power and jurisdiction to protect the sovereign rights of all Kenyan citizens, wherever they may be, to participate in the voting for leaders they opine are most suitable to lead this country.

NAIROBI.

5. THE MINISTER FOR JUSTICE, NATIONAL COHESION AND
CONSTITUTIONAL AFFAIRS
State Law Office,
Harambee Avenue,
NAIROBI.
6. THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS COMMISSION