



**Okoti v Attorney General & another; Matindi (Interested Party) (Petition E004 of 2022) [2025] KEHC 6897 (KLR) (Constitutional and Human Rights) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E004 OF 2022**

**LN MUGAMBI, J**

**MAY 22, 2025**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**ELIUD MATINDI ..... INTERESTED PARTY**

**Constitutionality of regulation 37 of the Elections (Registration of Voters) Regulations, 2012 which requires Kenyans in diaspora to be holders of valid passports to be registered as voters**

*The petition challenged the constitutionality of regulation 37 of the Elections (Registration of Voters) Regulations, 2012 to the extent that it required Kenyans living abroad to be holders of valid passports to be registered as voters yet Kenyans living in the East African Community were required to have a national identity card to be registered as a voter. The court highlighted the nature of issue-based estoppel. The court held that regulation 37 was not an unreasonable limitation article 38(3) or 83 (3) of the Constitution and that it was not discriminating Kenyans living at home and those in diaspora.*

Reported by Kakai Toili

**Constitutional Law** – fundamental rights and freedoms – limitation of fundamental rights and freedoms – right to be registered as a voter – where regulation 37 of the Elections (Registration of Voters) Regulations, 2012 required Kenyans living abroad to be holders of valid passports to be registered while Kenyans living in the East African Community were required to have a national identity card - whether regulation 37 was unconstitutional for unreasonably limiting the right to register as a voter and for being discriminatory - Constitution of Kenya, articles 10, 24, 38(3) and 83(3); Elections (Registration of Voters) Regulations, 2012, regulation 37.



**Civil Practice and Procedure** – estoppel – issue-based estoppel – what was the nature of issue-based estoppel - Civil Procedure Act (cap 21), section 7.

### **Brief facts**

The petition assailed the constitutionality of regulation 37 of the Elections (Registration of Voters) Regulations, 2012 to the extent that it required Kenyans living abroad to be holders of valid passports to be registered as voters yet Kenyans living in Kenya and the East African Community were required to have a national identity card to be registered as a voter. According to the petitioner that requirement did not meet the threshold set out in article 24 of the Constitution and limited those Kenyans' rights under article 38(3)(a) of the Constitution. Consequently, the petitioner sought for among other orders; a declaration that regulation 37 was unconstitutional.

### **Issues**

- i. Whether regulation 37 of the Elections (Registration of Voters) Regulations, 2012 which required Kenyans living abroad to be holders of valid passports to be registered while Kenyans living in the East African Community were required to have a national identity card was unconstitutional for;
  1. unreasonably limiting the right to register as a voter; and
  2. for being discriminatory.
- ii. What was the nature of issue-based estoppel?

### **Relevant provisions of the Law**

#### **Elections (Registration of Voters) Regulations**

#### **Regulation 37 - Eligibility to Vote.**

*A Kenya citizen residing outside Kenya shall apply for registration as a voter upon production of a valid Kenyan Passport.*

*Provided that citizens residing in countries within the East African Community may present an Identity Card.*

### **Held**

1. In interpreting the Constitution, the court was guided by the Constitution itself. In particular article 259(1) where the Constitution declared how it should be interpreted and also principles established through judicial precedent. Issue-based estoppel was rooted in the principle of *res-judicata* which was provided for in section 7 of the Civil Procedure Act. Issue-based estoppel prevented issues that had been litigated from being re-introduced in subsequent proceedings.
2. The petition had been instituted in public interest. The finding on any issue was a decision in *rem* which meant such an issue could not be the subject of another subsequent suit as it would offend the principle of *res-judicata*. Therefore, the finding of the court in *Kenya Diaspora Alliance & 2 others v IEBC & another* (Petition No.71 of 2017) on the constitutionality of regulation 37 of the Elections (Registration of Voters) Regulations, 2012 could not be impeached via the instant petition considering that the instant court was a court of co-ordinate jurisdiction.
3. Article 24 of the Constitution allowed a right or fundamental freedom in the Bill of Rights to be limited as long as there were reasonable and justifiable grounds taking into account the nature of the right and fundamental freedom, the importance of the purpose of limitation, the nature and extent of limitation among others. Given that it was not conceivable to reasonably expect a Kenyan lawfully residing in diaspora to do so without a valid passport, such a limitation was based on reasonable grounds and also obviated the possibility of having persons who might have clandestinely renounced their citizenship from participating in voting or vying for public positions in Kenya.
4. Regulation 37 of the Elections (Registration of Voters) Regulations, 2012 was not an unreasonable limitation of article 38(3) or 83 (3) of the Constitution. It was not discriminating Kenyans living at home and those in diaspora. That differentiation was based on reasonable grounds considering that Kenyans living lawfully in diaspora must have, as condition precedent, a passport and not an identity card as was the case with Kenyans residing at home. Requiring them to provide a passport was thus



not discriminative as that was a legal document that they would naturally and legally be expected to have as a condition of lawfully residing outside Kenya.

5. Article 10 of the Constitution on the national values and principles of governance bound all persons in enacting, applying or interpreting any law. Integrity and transparency were embraced in article 10(2)(c) of the Constitution. Regulation 37 of the Elections (Registration of Voters) Regulations, 2012 ensured that only Kenyans genuinely living in diaspora were registered as voters in line with the principles of transparency and integrity championed by the Constitution.

*Petition dismissed with no orders as to costs.*

## **Citations**

### **Cases**

#### **Kenya**

1. *Gichuru v Package Insurance Brokers Ltd* Petition 36 of 2019; [2021] KESC 12 (KLR) - (Explained)
2. *Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others* Petition 25 of 2014; [2015] KESC 21 (KLR) - (Followed)
3. *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party)* Petition E016 of 2023; [2024] KEHC 2890 (KLR) - (Explained)
4. *Kenya Commercial Bank Limited & another v Muiri Cofee Estate Limited & 3 others* Motion 42 & 43 of 2014 (Consolidated); [2016] KESC 6 (KLR) - (Explained)
5. *Kenya Diaspora Alliance & 2 others v Independent Electoral and Boundaries Commission & another* Petition No 71 of 2017 - (Followed)
6. *Mumira v Attorney General* Constitutional Petition E007 of 2020; [2022] KEHC 271 (KLR)
7. *New Vision Kenya (NVK Mageuzi) & 3 others v Independent Electoral and Boundaries Commission & 8 others* [2016] eKLR - (Followed)
8. *Nyarangi, James Nyasora & 3 others v Attorney General* Anti-Corruption and Economic Crime Petition 298 of 2008; [2008] KEHC 3906 (KLR) - (Explained)

### **Statutes**

#### **Kenya**

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Constitution of Kenya articles 24, 38(3)(a); 83(3); 88(5) - (Interpreted)
3. Elections (Registration of Voters) Regulations, 2012 (cap 7 Sub Leg) regulations 2, 8, 13A(2); 37 - (Interpreted)
4. Elections Act (cap 7) sections 2,3, 5(3) - (Interpreted)
5. Interpretation And General Provisions Act (cap 2) section 31(b) - (Interpreted)
6. Registration of Persons Act (cap 107) sections 2, 6, 9 - (Interpreted)
7. Statutory Instruments Act (cap 2A) section 24(2) - (Interpreted)

### **Advocates**

None mentioned

## **JUDGMENT**

### **Introduction**

1. The petition dated 5 January 2022 is supported by the petitioner's affidavit in support of similar date and further supplementary affidavits dated 12, 16 and 22 January 2022.



2. The petition assails the constitutionality of regulation 37 of the *Elections (Registration of Voters) Regulations, 2012* to the extent that it requires Kenyans living abroad to be holders of valid passports to be registered as voters yet Kenyans living in the Country and the East African Community are required to have a National Identity card to be registered as a voter.
3. According to the petitioner this requirement does not meet the threshold set out in article 24 of the *Constitution* and limits these Kenyans right under article 38(3)(a) of the *Constitution*.
4. Consequently, the petitioner seeks the following reliefs against the respondents:
  - i. A declaration be issued that regulation 37 of the *Elections (Registration of Voters) Regulations, 2012* is unlawful and unconstitutional and, therefore, invalid, null and void.
  - ii. A declaration be issued that by enacting regulation 37 of the *Elections (Registration of Voters) Regulations, 2012* the Commission failed to exercise its powers and perform its functions in accordance with this Constitution and national legislation as provided for under article 88(5) of the *Constitution*.
  - iii. A declaration be issued that the respondents should be condemned to pay the costs of this motion.
  - iv. An order be issued quashing regulation 37 of the *Elections (Registration of Voters) Regulations, 2012*.
  - v. An order be issued compelling the respondents to bear the costs of this petition.
  - vi. Consequent to the grant of the prayers above the court be pleased to issue any other or further remedy (directions and orders) that shall deem necessary to give effect to the foregoing orders, and/or favour the cause of justice.

#### **Petitioners' Case**

5. The petitioner posits that the impugned regulation, prohibits the use of national identification cards for diaspora voter registration. He asserts that this is in contravention of article 24 of the *Constitution* which expressly provides that a right, in this case article 38(3) shall not be limited without any justification.
6. He as well takes issue with the impugned regulation since the limitation is provided for in a subsidiary legislation and not in the substantive law, the *Elections Act* as required under article 12(2) of the *Constitution*.
7. It is also contended that the subsidiary law does not have capacity to prohibit use of national identification for diaspora voter listing because the *Elections Act* under sections 2, 3 and 5(3) of the *Election Act, No. 2 of 2011* permits it. That this goes against the principle incorporated in section 31(b) of the *Interpretation and General Provisions Act* and section 24(2) of the *Statutory Instruments Act* that subsidiary legislation shall not be inconsistent with any Act of Parliament.
8. The impugned regulation creates confusion in that it contradicts regulations 2, 8, 13A(2) and (3) and Form A of the *Elections (Registration of Voters) Regulations, 2012*, which allow the use of national IDs for voter registration without any restriction.
9. The petitioner further argues that the impugned regulation violates article 83(3) of the *Constitution* as denies eligible Kenyan citizens in the diaspora the right to vote in an election.



10. Taking these factors into account, the petitioner contends that the requirement that Kenyans in the diaspora can only register as voters using their valid passports and not national identity cards is both unlawful and unconstitutional.
11. In view of the now completed general election in 2022, the petitioner stresses that the requirement was unreasonable as by then, the Government had already declared non-biometric passports invalid as from 31 December 2021. In that instance, the petitioner argued (although now overtaken by events) that it was imperative that the Kenyans in diaspora be allowed to register using their national identity cards.
12. In closing, the petitioner argues that the impugned regulation not only violates the Constitution but also as stated herein, sections 2, 6 and 9 of the Registration of Persons Act, section 31(b) of Interpretation and General Provisions Act, section 24(2) of the Statutory Instruments Act, 2013, sections 2, 3, 4, and 5(3) of the Elections Act and regulations 8, 13A(2) & (3), and Form A of the Regulations.

### **1<sup>st</sup> Respondent's Case**

13. In response thereto, the 1<sup>st</sup> respondent filed grounds of opposition dated 10 February 2022 and a replying affidavit by the Principal Immigration Officer, Jimmy Nyikuli sworn on 17 March 2022.
14. The grounds of opposition are on the basis that:
  - i. The right to vote is not absolute and the same may be subjected to limitations as may be provided for in law.
  - ii. The regulation being challenged, enjoys presumption of constitutionality.
  - iii. The petitioner herein has not demonstrated before the court how the 1<sup>st</sup> respondent has violated their constitutional rights.
  - iv. There is no justification in the petition, indicating how one could be living in the diaspora without a valid Kenyan passport, as that would be an illegality.
  - v. The petition is based on an apprehension rather than a fact. The deadline for the requirement to change passports to the new generation passports, has been moved from December, 2021 to afterwards in 2022.
  - vi. Both the petition and application are defective both in form and in substance and are therefore unmerited and brought in bad faith.
  - vii. It is in the public interest and in the interest of justice that the current application and petition be dismissed with costs as the same is an abuse of court process.
15. In the reply, Jimmy Nyikuli notified that the Directorate of Immigration had on 21 January 2022, resolved to extend the deadline for acquisition of the digital passports from 31 December 2021 to November 2022. On that basis, all Kenyans with valid passports were eligible to access government services.

### **2<sup>nd</sup> Respondent's Case**

16. In response to the petition, the 2<sup>nd</sup> respondent filed a replying affidavit through Chrispine Owiye, sworn on 2 March 2022.
17. He avers that contrary to the petitioner's allegation, the impugned regulation is not in conflict with section 5(3) of the Elections Act, the Elections (Registration of Voters) Regulations, 2012 or any other law. He avers that article 88(4)(a) of the Constitution as read with section 5(3) of the Elections Act



demonstrates that the 2<sup>nd</sup> respondent is granted the power to prescribe the manner of registration of voters, whether residing in or outside the country.

18. He avers that the impugned regulation prescribes the procedure and manner of registration of voters. With reference to voters residing outside the country and the East African Community, registration is restricted to persons with valid passports.
19. In like manner, it is averred that contrary to the petitioner's allegation, regulation 8, 13, 13A (2) and (3) and Form A and J of the *Elections (Registration of Voters) Regulations, 2012*, do not stipulate either the choice of a national identity card or valid passport for persons residing outside Kenya in terms of registration. Thus, in absence of such prescription therein, these provisions ought to be read together with the impugned regulation.
20. He posits thus that the impugned regulation does not violate the *Constitution* neither present an unreasonable limitation under article 38(3) and 24(2) of the *Constitution*. It is noted that the court discussing the issue in Petition No 71 of 2017: *Kenya Diaspora Alliance & 2 others v IEBC & another* found as much, since held that provisions of section 37 of the *Regulations (Elections (Registration of Voters) Regulations, 2012* provide a reasonable limitation to the right to vote.
21. He stresses that a valid Kenyan passport which contains an expiry date is the only way they can ascertain a person's citizenship while residing outside the country so as to safeguard the credibility of the voter registration process. Considering this, he states that the petitioner has failed to demonstrate how the 2<sup>nd</sup> respondent exercised its powers contrary to the *Constitution* or the legislation. On this premise, he argues that the petition lacks merit.

#### **Interested Party' Case**

22. The interested party's response to the petition is not in the court file or Court Online Platform (CTS).
23. It is worthy to note that there was an intended party known as the Kenya Diaspora Alliance (KDA) Trust which vide their notice of motion Application dated 15 February 2022 had sought to be enjoined in this suit. The initially dismissed application was reinstated however the record does not reflect whether this party was ever granted leave to join this suit.

#### **Petitioner's Submissions**

24. The petitioner's submissions are not in the court file or Court Online Platform (CTS).

#### **1<sup>st</sup> Respondent's Submissions**

25. Jackline Kiramana for the 1<sup>st</sup> respondent filed submissions dated 10 March 2023 and highlighted the issues for determination as: whether the impugned regulation is unconstitutional and whether there has been a violation of rights.
26. To commence with, counsel noted that the challenge to the use of passports instead of national identity cards with regard to the impugned regulation is not novel. Counsel submitted that the court in the matter of *Kenya Diaspora Alliance & 2 others (supra)* declined a similar relief and noted as follows:

“In the instant case, the bone of contention was the claim that the 1st Respondent in applying the provisions of regulation 37 of the Election (Registration of Voters) Regulations, 2012, limited the registration of voters in the diaspora to only those who had Kenyan Passports when the *Elections Act* allows for registration using both the National ID and Kenyan Passports... In sum, it is expected that anyone travelling abroad must possess a passport and



I therefore find that the provisions of regulation 37 of the Election (Registration of Voters) Regulations, 2012 provide reasonable limitations to the right to vote as it is not expected that we can have a different set of laws for Kenyans in the East African Countries and for those in other parts of the diaspora.”

27. Counsel submitted that the court in that case upheld the impugned regulations constitutionality. It is noted that this decision was not appealed. Accordingly, counsel submitted that the matter herein has already been determined as the key contention in this suit is identical to the cited case.
28. On the second issue, counsel submitted that the petitioner posits that the rights of Kenyans living in the diaspora has been violated by the said limitation. Counsel emphasized that the impugned right is one that is set to be realized progressively as held in *New Vision Kenya (NVK Mageuzi) & 3 others v Independent Electoral and Boundaries Commission & 8 others* [2016] eKLR. This decision was upheld in both the Court of Appeal and the Supreme Court.
29. Moreover, counsel submitted that the court in *Kenya Diaspora Alliance & 2 others (supra)* rationalized that every Kenyan citizen living in the diaspora is reasonably required to have a valid Kenyan passport as it is the internationally recognized travel document. Counsel contended that allowing Kenyans residing abroad without valid passports to register as voters using the national identity card, would pose a risk, as people who may have denounced their citizenship, can register as voters, thereby compromising the integrity of the voters register and by extension, the verifiability of the election.
30. Furthermore, counsel highlighted that where one would be living without a valid passport abroad would be mean that any orders issued by the court would aid sanitization of an illegality.
31. Counsel also reminded that the right to vote equally is not an absolute. On this premise, counsel submitted that none of the alleged rights had been violated as the respondents acted in accordance with the law.

## **2<sup>nd</sup> Respondent’s Submissions**

32. On 9 March 2023, counsel for the 2<sup>nd</sup> respondent filed submissions in opposition to the petition and outlined the issues for discussion as: Whether regulation 37 is unlawful and/or unconstitutional and whether the 2<sup>nd</sup> respondent breached article 88(5) of the [Constitution](#) in enacting this regulation.
33. Counsel submitted that the impugned regulation is not in conflict with section 5(3) of the [Elections Act](#). This is because this section only provides for proof of attainment of 18 years either through a national identity card or a Kenyan passport. This section then proceeds to provide that registration as a voter will be conducted through an application in the prescribed manner.
34. Counsel stated that the 2<sup>nd</sup> respondent is empowered to prescribe the manner in which such a registration will be conducted under article 88(4)(a) of the [Constitution](#). Consequently, counsel submitted that the impugned regulated primarily prescribes the manner in which Kenyans residing abroad can be registered as voters.
35. Equally, counsel submitted that regulations 8,13, 13A (2) & (3) and Form A and J of the [Elections \(Registration of Voters\) Regulations, 2012](#) do not prescribe the choice of either a national identity card or valid passport for registration of Kenyan citizens residing abroad. Therefore, in the absence of such a prescription, counsel submitted that regulations 2, 8, 13(1), 13A (2) & (3), 35, 36 of the [Elections \(Registration of Voters\) Regulations, 2012](#) should therefore be read together with the impugned regulation.



36. Likewise, counsel submitted that the impugned regulation is not discriminatory as not all distinctions resulting in differential treatment can be said to violate equality rights as envisaged under the Constitution. It was stressed that a law or regulation will not be deemed discriminatory if there is a reasonable distinction between those favored and those not favored by the law. Reliance was placed in James Nyasora Nyarangi & 3 others v Attorney General [2008] eKLR where it was held that:

“The *Bill of Rights Handbook*, Fourth Edition 2001, defines discrimination as follows: -  
“A particular form of differentiation on illegitimate ground.” The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity...

In our jurisdiction, in the case of *RM v Attorney General*, NBI HCCC No 1351 of 2002 *RM (suing thro’ Next Friend) Josephine Kavinda & another v Attorney General*, the court dealt with the issue of discrimination in depth and held:-

“We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:

- i. Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and
- ii. Are reasonable in the light of their legitimate aim.

...

Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word “discriminatory” in section 82 of the Constitution.”

37. In this case, counsel submitted that a valid Kenyan passport is the only certain way of certifying citizenship for Kenyan citizens residing outside the country. Reliance was placed in *Kenya Diaspora Alliance & 2 others (supra)* which found in favour of the impugned regulation. In this context, the imposed limitation was argued to be reasonable and justifiable. Considering this, counsel submitted that the impugned Regulation does not offend article 83(3) of the Constitution as seeks to protect eligible citizens from being denied their right to vote.

38. In the second issue, counsel submitted that the petitioner had not demonstrated how the 2<sup>nd</sup> respondent had exercised its powers contrary to the Constitution or legislation. Counsel echoed that the requirement to use a valid Kenyan passport is pursuant to the statutory requirement under section 5(3) of the Elections Act and the impugned regulation, both of which were enacted by Parliament.

### Interested Party’s Submissions

39. The interested party in support of the petition filed submissions dated 28<sup>th</sup> July 2022. He stated the issues for discussion as: whether regulation 37 of the Elections (Registration of Voters) Regulations, 2012, is unlawful and unconstitutional and, therefore, invalid, null and void and whether, by enacting regulation 37 of the Elections (Registration of Voters) Regulations, 2012, the Commission failed to exercise its powers and perform its functions in accordance with this Constitution and national legislation as provided for under article 88(5) of the Constitution.



40. Answering in the affirmative, the interested party submitted that the impugned regulation is unlawful and in breach of articles 10(2), 24 and article 27 of the Constitution. He contended that the impugned regulation unconstitutionally entrenches and compounds unlawful direct discrimination against Kenyan citizens residing outside Kenya, other than in countries within the East African Community, in their ability to register as voters and, to exercise their rights under article 38 of the Constitution
41. He noted that whereas Kenyan citizens residing in Kenya or in countries in the East African Community, can apply for registration as voters upon presentation of their identification document, Kenyan citizens residing outside Kenya can only apply for registration as voters upon production of a valid Kenyan passport. Considering this, the interested party submitted that the impugned Regulation and the resultant restrictions amounts to unlawful discrimination, in violation of article 27(1), (2) and (4) of the Constitution.
42. Reliance was placed in Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR) where it was held that:
- “Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
43. In addition, he submitted that the impugned regulation further violates article 27(6) of the Constitution which requires the State to take legislative and other measures designed to redress any disadvantage suffered by individuals or groups because of past discrimination. It was stated that this aspect was captured by the Supreme Court in Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others [2015] eKLR wherein the superior court observed that prior to the promulgation of the Constitution, Kenyans in the diaspora could not actualize their right to vote.
44. The interested party additionally submitted that while the right under article 38 of the Constitution can be limited, the impugned regulation amended vide Legal Notice No 73 of 2017 dated 2<sup>nd</sup> May 2017, fails to meet the requirements of article 24 of the Constitution.
45. He asserted that the fact that the respondents following issuance of conservatory orders in this matter, were able to register him as a voter with his Kenyan national identification card despite him not being in Kenya, confirms that the limitation imposed by regulation 37 is not reasonable and justifiable in an open and democratic society.
46. He added that this is especially in the context of the duty imposed by article 83(3) of the Constitution which requires 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.
47. On the second issue, the interested party submitted that by enacting the impugned regulation, the 2<sup>nd</sup> interested party failed to exercise its powers and perform its functions in accordance with the Constitution and legislation as provided for under article 88(5) of the Constitution. He argued that



the impugned regulation imposes an additional requirement that a citizen residing outside the East African Community can only register as a voter upon production of a valid Kenyan passport.

48. He equally stressed that the definition of a valid Kenyan passport was not defined in the impugned regulation. He submitted that owing to the 1<sup>st</sup> respondent's replying affidavit, it was evident that the validity of a Kenyan passport can be varied by an administrative act. In his view, the changing of date of validity of Kenyan passports, including for the purpose of being able to register as a voter under article 38(3)(a) of the Constitution through administrative pronouncements which have no anchorage in the Constitution or statutes, offends article 24 of the Constitution and the law. Accordingly, he contended that the requirement for a 'valid' Kenyan passport under in the impugned Regulation lacks any legal foundation.

### **Analysis and Determination**

49. The issues for determination in this petition may in my humble view be summarized as follows:
1. Whether regulation 37 of the Elections (Registration of Voters) Regulations, 2012 is unconstitutional.
  - 2) Whether in enacting regulation 37 of the Elections (Registration of Voters) Regulations, 2012; the 2<sup>nd</sup> respondent violated article 88(5) of the Constitution and the relevant national legislation relating to the subject matter.
  - 3) Whether the petitioner is entitled to the reliefs sought

### **Whether regulation 37 of the Elections (Registration of Voters) Regulations, 2012 is unconstitutional**

50. In interpreting the Constitution, the court is guided by the Constitution itself; in particular article 259 (1) where the Constitution declares how it should be interpreted and also principles established through judicial precedent. The applicable principles were concisely articulated by the court in the case of Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika [2024] KEHC 2890 (KLR) as follows:

- “ 111. The developing precedent on constitutional interpretation from the superior courts has now evolved and coalesced as follows;
- i. Article 259 of the Constitution as a mandatory principle obliges courts to protect and promote the spirit, purposes, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.
  - ii. the Constitution must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.
  - iii. the Constitution must be interpreted in a contextual manner, that courts are constrained by the language used and so cannot impose a meaning that the text is not reasonably capable of bearing. Furthermore, constitutional interpretation does not favour a formalistic or positivistic approach but a generous



construction of the text in order to afford the fullest possible constitutional guarantees.

- iv. In considering the purposes, values and principles while interpreting the Constitution, courts must take into account the non-legal phenomena by reflecting on the history of the text.
- v. Constitutional interpretation demands that no one provision of the Constitution should be segregated from the others or be considered alone. The provisions are to be interpreted as an integrated whole so as to effectuate the greater purpose of the Constitution.
- vi. Where there is an impugned provision in a Statute the same must as much as possible be read in conformity with the Constitution to avoid a clash.
- vii. The court ought to examine the object and purpose of the Act (Statute) and if any statutory provision read in its context can reasonably be construed to have more than one meaning the court must prefer the meaning that best promotes the spirit and purposes of the Constitution. See *Tinyefuza v Attorney-General* Const Pet No 1 of 1996 [1997 UGCC 3] and *Re Hyundai Motor Distributors (PTY) & others v Social No & others* [2000] ZACC 12 2001(1) SA 545.
- viii. The principles of interpretation require that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context. See *Adrian Kamotho Njenga v Kenya School of Law* [2017] eKLR and *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR.”

112. When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the article(s) of the Constitution and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the Section or the Act, and see whether any of the two could lead to the provision being declared unconstitutional. That is to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision.”

51. In embarking on the task ahead, I begin by setting out regulation 37 of the Elections (Registration of Voters) Regulations which gave rise to the institution of this Petition. It provides:

Eligibility to Vote.

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

Provided that citizens residing in countries within the East African Community may present an Identity Card.



52. The petitioners contended that this regulation violates article 38(3) of the Constitution which gives every adult citizen the right to be registered as voter, to vote in any election and to be a candidate for public office as it unreasonably forbids the use of identity card for purposes registering diaspora voters. Further, that it violates article 83(3) of the Constitution which provides that administrative arrangements for regulation of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or vie in an election. In addition, the Petitioner contended that regulation 37 violates article 27(1) & (2) for discriminating against Kenyan Citizens in diaspora by not allowing them to use the national identity cards to register as voters while allowing Kenyans at home to do so.
53. The respondents countered the petitioner’s position by pointing out that the constitutionality of Regulation 37 Elections (Registration of Voters) Regulation, 2012 was settled by the Court in the case of *Kenya Diaspora Alliance & 2 others v IEBC & another* (Petition No 71 of 2017).
54. I read carefully the Judgment of Okwany J in the above cited case by the respondents and this is what the Judge had to say when confronted with the issues presented in that petition:
- “49. In the instant case, the bone of contention was the claim that the 1<sup>st</sup> respondent, in applying the provisions section 37 of *Elections (Registration of Voters) Regulations* (hereinafter “the Regulations”) limited the registration of voters in the diaspora to only those who had Kenyan passports when the *Election Act* allows for registration using both the national identity cards and Kenyan passports...
50. The petitioners maintained that section 37 of the regulations is inconsistent with section 5(3) of the *Elections Act* and argued that by dint of section 31 of the *Interpretation and General Provisions Act*, a subsidiary legislation ought to be consistent with the Act of Parliament... In sum, it is expected that anyone travelling abroad must possess a passport and I therefore find that provisions of section 37 of the Regulations provide reasonable limitation to the right to vote ...”
55. In my view, the above finding presents what is referred to as issue-based estoppel. It is rooted in the principle of res-judicata which is provided for in section 7 of the Civil Procedure Act which states as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
56. The Supreme Court affirmed the relevance of this principle in constitutional litigation in the case Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR where it held thus:
- “(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of



res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

57. Issue based estoppel prevents issues that have been litigated from being re-introduced in subsequent proceedings. In *Mumira v Attorney General* [2022] KEHC 271 (KLR) the court explained the principle as follows:

“ 18. In the United Kingdom, res judicata is known as cause of action estoppel or issue estoppel... (A distinction is made between “cause of action estoppel” and “issue estoppel”. In the first case— “the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.” (*Arnold v National Westminster Bank* [1991] 2 AC 93 (HL) at 104.) In the second case— “a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.” (Arnold at 105.)

58. In previous case, the petition, just like the present case had been instituted in public interest as evidenced by the following remarks by the judge:

“...I find that the petitioner, in filing the instant petition, had a genuine intention of pursuing the rights of Kenyans living in the diaspora, albeit without the requisite proof. In that regard I find that each party shall bear its own costs...”

59. Clearly therefore, the finding on any issue therein was a decision in rem which means such an issue cannot be the subject of another subsequent suit as it would offend the principle of res-judicata.

60. It means therefore the finding of the Judge on the constitutionality of regulation 37 of the *Elections (Registration of Voters) Regulations, 2012* cannot be impeached via this petition considering that this is a court of coordinate jurisdiction.

61. I would add that article 24 of the *Constitution* allows a right or fundamental freedom in the Bill of rights to be limited as long as there are reasonable and justifiable grounds taking into account the nature of the right and fundamental freedom, the importance of the purpose of limitation, the nature and extent of limitation among others. Given that it is not conceivable to reasonably expect a Kenyan lawfully residing in diaspora to do so without a valid passport, such a limitation is based on reasonable grounds and also obviates the possibility of having persons who might have clandestinely renounced their citizenship from participating in voting or vying for public positions in Kenya. I thus disagree with the petitioner’s contention that this regulation is an unreasonable limitation article 38(3) or 83(3) of the *Constitution*.

62. Moreover, it is not also correct in my view to argue that it is discriminating Kenyans living at home and those in diaspora. In my view, that differentiation is based on reasonable grounds considering that Kenyans living lawfully in diaspora must have, as condition precedent, a passport and not an identity card as with Kenyans residing at home. Requiring them to provide a passport is thus not discriminative as that is a legal document that they would naturally and legally be expected to have as a condition of lawfully residing outside Kenya.



- 63. Article 10 of the Constitution on the national values and principles of governance binds all persons in enacting, applying or interpreting any law. Integrity and transparency are embraced in article 10(2) (c) of the Constitution. This Regulation ensures that only Kenyans genuinely living in diaspora are registered as voters in line with the principles of transparency and integrity championed by the Constitution.
- 64. The above findings obviate the need of considering any other issue in this petition.
- 65. The upshot therefore is that the petition is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF MAY, 2025.**

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**L N MUGAMBI**  
**JUDGE**

