

## KENYAN DIASPORA AS A CRITICAL NATIONAL RESOURCE – CONSTITUTIONAL PERSPECTIVES

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**ABSTRACT:** *In this paper, I examine a couple of pertinent provisions of the Kenya Constitution, 2010 as they may relate to the Diaspora. According to statistics from the Central Bank of Kenya, remittances from Kenyans resident and working outside of the country form a significant portion of the gross national product (GDP) (Central Bank of Kenya, 2013). Arguably therefore, the Diaspora is one of Kenya's most significant resources, both human and economic. It has been over 4 years since the new Constitution was promulgated with fanfare. At the time, the document was widely perceived as, among other accomplishments, a game-changer in Diaspora engagement and participation. Prof. Makau Mutua opined that "the new constitutional dispensation opens up new and exciting vistas for Kenya's Diaspora to effectively participate in shaping the country's future." In particular, the author will review Article 16 (Dual Citizenship) and Article 38 (Political Rights) and subsequent judicial interpretations and attempt to answer the question: HOW ARE WE DOING? In the author's opinion, the answer is NOT SO WELL. There is little evidence that the country has had any shift in public perception, attitude or policy at the highest levels of government. Rhetoric is one thing, implementation thereof quite another. I conclude that until and unless Kenya creates structures and systems enabling optimum utilization, rather than marginalization and disenfranchisement of the Diaspora, her goal of becoming the economic giant of Eastern Africa will remain a pipedream. Strategic and intentional recognition of the Diaspora as a critical national resource is in the nation's interest. The place to begin is full and progressive implementation of the Constitution.*

**Key Words:** Constitution, Diaspora, Dual citizen, Kenya, Voting

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### Introduction

Article 1 of the Constitution of Kenya, 2010 (hereinafter, "The Constitution") boldly proclaims "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." Despite such lofty provisions in her Constitution, Kenya is yet to fully recognize the true worth and take tangible, concrete, coherent and pragmatic steps to strategically utilize one of her most critical resources: the Diaspora. All available post-promulgation evidence seems to point in the opposite direction.

In this paper, I review two Diaspora-specific provisions in the Constitution and their implementation (or lack thereof) since promulgation. In my view, four years later, there is little or no noticeable progress on the "Diaspora Agenda" (however one defines it). Instead, a discernible mismatch emerges between rhetoric and reality. In particular, I interrogate the provisions relating to Dual Citizenship (especially Articles 16 and 78) and the Right to Vote (Articles 38(3) and 82 (1) of the Constitution) and their recent interpretation by the judiciary – the High Court and the Court of Appeal. The Supreme Court is yet to speak on the issue.

I opine that thus far, the Kenyan Diaspora, despite being one of the nation's most important resources, is yet to receive the appropriate recognition from a constitutional standpoint. I grade the performance as unsatisfactory or needing serious efforts. In conclusion, I offer a set of recommendations with a view towards more effective engagement and participation.

### Discussion

#### *I. The Dual Citizenship Fallacy*

Article 16 of the Constitution (Dual Citizenship) provides that "(A) citizen by birth does not lose citizenship by acquiring the citizenship of another country." Meaning therefore, once a Kenyan by birth, one remains a Kenyan citizen regardless of how many other passports he or she acquires later in life. Well and good. However, Article 78(2) provides that a "State officer or a member of the defense forces shall not hold dual citizenship." The only exceptions are judges and members of commissions.

Article 260 of the Constitution (Interpretation) provides a sweeping definition of "State office," encompassing everything from President through the Attorney General, to members of county assemblies (MCAs) and everything in between. It further proclaims that "any office designated as a state office by national legislation" shall be deemed so. Therefore, no holders of such offices shall be elected or appointed thereto if they hold dual citizenship. The supreme law of the land forbids Kenyan citizens holding dual citizenship (explicitly granted under Article 16 of the Constitution) from playing any meaningful role in public service.

Additionally, there have been no discernible efforts to fully integrate the Diaspora population into the fabric of the country of their birth. As one commentator aptly observed, the law in this area is still so murky as to be scary: Kenyans who may have acquired dual citizenship may not be as safe as initially thought. (Njogu-Wahome, 2011). Perhaps indicative of where the Diaspora sits on the priority list, no significant clarifying

legislation has been forthcoming from the National Assembly or the Senate.

It is doubtful that *wananchi* (as the ultimate Sovereign under Article 1) intended to bar the Diaspora from participation in national and county development. Other countries notably India, Israel, Italy, the Philippines and China have developed frameworks through which their citizens abroad remain engaged and involved in their home countries. For these countries, leveraging the knowledge, experiences and resources of their Diaspora citizens is a no-brainer.

On the other hand, Kenya seems to be headed in the opposite direction. Despite high rhetoric from public officials about the importance of the Diaspora, the reality is different. While one can readily understand the prohibition for senior government officials (such as the President and top brass in the armed forces), there is no similar justification for holders of other lower-level public offices. By shutting her sons and daughters residing abroad from all echelons of public service, the people of Kenya may be the ultimate losers. Contrary to the optimism expressed by Prof. Makau Mutua and others, the new Constitution has done little to “mitigate the deleterious effects of the brain drain.” (Mutua, 2011).

## ***II. Diaspora Kenyans’ Right to Vote & The Landmark Case of New Vision Kenya (NVK Mageuzi) & 3 Others v. Independent Electoral and Boundaries Commission & 4 Others***

Despite spending an unknown amount of taxpayer funds in globe-trotting (ostensibly to prepare for Diaspora voting), the Hassan-led Independent Electoral and Boundaries Commission (IEBC) concluded that the Kenyans abroad could not vote in the 2013 general elections. A narrow exception was carved for those living in neighboring East African countries. The Cabinet later endorsed this decision through an announcement by the then Justice Minister, Mr. Eugene Wamalwa, citing financial and time constraints. These were neither identified nor specified.

Utterly dissatisfied and disappointed, Kenyan diaspora organizations (including the Peter Kenneth Diaspora team of which I was part), mobilized resources and filed suit in the High Court. In *New Vision Kenya (NVK Mageuzi) et. al. v. Independent Electoral and Boundaries Commission (IEBC) & 4 Others, Petition No. 331 of 2012*, the petitioners sought orders, *inter alia*, to compel IEBC to set up more polling stations in the Diaspora. On November 15, 2012, Justice Majanja dismissed the petition, finding that the right of Kenyans abroad to vote was not absolute and may be subject to reasonable restrictions. He agreed with IEBC that the law only permitted “progressive realization” of the right to vote by these Kenyans. Despite the Constitution, Kenyans in most of the Diaspora were denied the right to vote in the March 4, 2013 general elections. With the stroke of a pen, Justice Majanja had handed IEBC’s decision judicial imprimatur and legitimacy.

The decision was met with understandable outrage across the Diaspora. In an opinion published on November 20, 2012, we profoundly disagreed with the tone and substance of the ruling. (Ongeri & Kerre, 2013). According to the Court, “...criteria *how* and *when* Kenyans shall vote... is within IEBC’s discretion.” In

our view, permitting IEBC to lawfully deny otherwise eligible Kenyans their right to vote in its “sole discretion” was an affront to constitutionalism, fundamental justice and fairness. Justice Majanja’s decision effectively disenfranchised millions of adult Kenyans in the Diaspora.

We raised several particular objections to the judgment: First, in our view, the Court fundamentally misconstrued and misapplied Article 38(3) of the Constitution which states, “Every adult Kenyan has the right (to vote) *without unreasonable restrictions*.” (emphasis added). Apparently as per the Court, the Diaspora is one, monolithic and identical unit. On the contrary, Kenyans living abroad reside in countries with widely varying circumstances. One cannot rationally treat the United States (which is a continent for all practical purposes) as one would a small country like the Gambia. Restrictions that may not be unreasonable for a Kenyan in the Gambia may be unduly burdensome, expensive and unreasonable for a Kenyan in the U.S. or Russia. In determining whether restrictions may be “unreasonable” under Article 38(3), the Court should conduct a more deliberate and specific inquiry. Sadly, the Court did neither.

Second, the High Court sanctioned IEBC’s “race to the bottom” approach. In other words, doing the bare minimum to satisfy literal constitutional and legal mandates was now legally acceptable. The Court seemed to unquestionably accept IEBC’s “legal, administrative and policy” limitations without an affirmative finding. Per the Court, “The right to vote for persons residing abroad presents complex problems.” However, the Court neither identified nor analyzed what these problems were and how they could be tackled within a legal framework. As importantly, the Court was unconcerned why these “complex problems” remain unresolved and whose responsibility they were. In fact, IEBC never determined how much time or resources were needed for the “progressive realization” of the right to vote by Diaspora Kenyans. As early as August, 2011, many Kenyan organizations and individuals offered to help but IEBC stonewalled and dismissed them. Going to court was only a last resort. With its ruling, the Court slammed the door shut too.

Finally, petitioners never sought “instant realization” of the right to vote. With due respect, the Court purported to deny relief that was never sought. All the petitioners and fellow Kenyans in the Diaspora prayed for were reasonable opportunities to exercise what is after all, a fundamental, constitutional right. The petitioners’ prayers were modest: additional polling centers (unaware that IEBC planned for none), secure electronic voting and a chance to vote for other candidates, not just presidential. But the Court dismissed these as instant and opted not to “interfere in (sic) the work of the IEBC.” Ironically, petitioners were seeking progressive realization of their right to vote too.

### **Court of Appeal’s Apparent Reprieve**

As was widely expected, the aggrieved petitioners lodged an appeal in the Court of Appeal against Justice Majanja’s decision. (*NVK Mageuzi & 3 Others v. Independent Electoral and Boundaries Commission (IEBC) & 4 Others*, Court of Appeal Civil Appeal No. 350 of 2012. In a reversal, Nambuye, Musinga and M’Inoti, JJ ruled that the right to vote and to be registered as a voter should be enjoyed by all without distinction of whether a person is

living in the country or in the diaspora. They directed the IEBC to set up voter registration centers in the diaspora and to put in place infrastructure that will allow many Kenyans outside the country to register and participate in any election. The learned judges wrote: “In the circumstances, an order is made directing the electoral commission, the Attorney General, the Ministry of Foreign Affairs and the Immigration Department to adequately provide for progressive voter registration for Kenyans in diaspora for all elective positions,”

Naturally, petitioners/appellants justifiably felt vindicated: the words of the learned Justices of Appeal confirmed that the Constitution still lived and spoke to the fundamental aspirations of the citizenry, regardless of geographic location. Particularly gratifying was to see the appellate Court remind the High Court that “the citizens’ rights to vote in an open democratic society can only be limited when there are justifiable reason based on human dignity, equality and freedom.” At the time of writing, press reports had it that the IEBC had submitted an appeal to the Supreme Court, challenging the Court of Appeal’s decision.

### Commentary & Recommendations

As evident from the foregoing, the new Constitution is far from the panacea for the Diaspora that many expected. Aside from the internal inconsistencies especially on dual citizenship, there seems to be a reticence by policymakers and judicial officers alike, to implement and interpret Diaspora-specific provisions progressively. The genesis of the clamor for constitutional reform dating back to 1991 was an elevation of the governed above the governors, hence Article 1: the sovereignty of the people of Kenya. Four years later, the lack of effective legal and institutional frameworks based on the reality that the Diaspora is a key thread of the nation’s social and economic fabric, is inexplicable.

More worrisome, this lapse in pragmatism seems to pervade all of government: the executive, the judiciary and as well as the legislative bodies. For instance, when President Kenyatta created the awkwardly-named office of Digital, New and Diaspora and appointed Mr. Dennis Itumbi as director, Diaspora blogs went wild with commentary. The position’s mandate has since been adjusted to align with the parent ministry in charge of Diaspora affairs.

For their part, counties have not fared any better either. Other than seemingly endless streams of visits by governors, chiefs of staff and MCAs abroad, there is little evidence of meaningful engagement, even from those counties with significant populations in the Diaspora. For example, last summer, governors from Kisii and Nyamira counties visited Minnesota and “appointed” diaspora representatives for the respective areas. However, these appointees were not given clear instructions on their roles or even portfolios. They remain county representatives in name only. This is hardly a model for engagement.

However, all is not lost. For the Diaspora to effectively participate in the political, social and economic development of Kenya, I recommend:

1. **A meaningful, deliberate and intentional engagement with the Diaspora with Kenyan public institutions.** Structures and systems commensurate with the significance of Diaspora to the national economy should be put in place. Diaspora Kenyans should seek direct representation in the National Assembly, the Senate and county assemblies too.
2. **Pragmatic and progressive interpretation of the Constitution with an eye to making the necessary paradigm shift.** The reformed judiciary has a key role to play in this regard. Courts should adopt the courageous posture taken by the Court of Appeal in the *NVK Magenzi* case. Conservative and constrictive reading of the letter of the Constitution and other laws—especially when the result is defeating fundamental rights – should be a thing of the past.
3. **Real, active and impactful participation by the Diaspora in actual governance.** Diaspora should take it upon itself to organize around and articulate real issues. It is not outlandish to consider Diaspora-based, organizational outfits such as political action committees (PACs), political parties and strong movements. Disjointed, disorganized and incoherent (in some cases ethnically-driven) pockets of groups is only counterproductive.
4. **Honest, issue-based and ongoing dialogue between the Diaspora and the citizens back home.** The idea of a constitutional conference between the parties has wide appeal among Kenyan progressives. Also, Diaspora should explore the possibility of supporting calls for a referendum if the suggested changes to the Constitution are included in the mix of proposed reforms.

### Conclusion

Four years since promulgation of the Constitution of Kenya, 2010, not much seems to have changed for the Diaspora from a constitutional standpoint. As demonstrated here, the evidence so far suggests the Diaspora is not viewed as the national resource that it should be. Creating avenues of engagement and participation unhindered by tethers of dual citizenship should be a priority. Had the Court of Appeal not intervened, the High Court’s dim view of the right to vote by the Diaspora would have stood as a severe indictment of the Judiciary. Nonetheless, there exists still an opportunity to recognize and optimally utilize the economic and human resources spread across the Kenyan Diaspora. My list of recommendations is by no means intended to be exclusive or exhaustive, rather only as a conversation starter. The first and most critical step should be the full implementation and progressive interpretation of the Constitution. A culture of constitutionalism demands fidelity to the letter and spirit of the Constitution as approved by the holder of sovereign power- the people of Kenya. And these include citizens in the Diaspora.

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