"FAST TRACKING ELECTION PETITIONS: THE KENYAN PERSPECTIVE"

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1.0 INTRODUCTION

The right to vote is fundamental in any democratic state, but an entitlement does not guarantee that right simply by providing for elections. The crucial issue is the extent to which these elections meet national and international legal standards. Free and fair elections are therefore judged not only by the open and transparent manner that the elections are conducted, but also by the credibility and independence of the electoral management body (EMB) and the judiciary in the conduct and management of elections and resolving disputes before, during and after the polls, respectively. Any democratic society grants their populace the freedom and mechanisms to participate in the governance of the country. One such mechanism is questioning the validity of an election process through election petitions.

An independent judiciary is therefore an essential ingredient in the attainment of free and fair elections. Mzee Julius Nyerere[1], argued that unless judges perform their work "properly, none of the objectives of [a] democratic society" can be met[2]. Accordingly, any initiative that seeks to reform the electoral process in Africa must also focus on the judicial system, due to the central role that courts play in the resolution of electoral disputes in particular and the promotion and protection of democracy in general.

International standards for elections are grounded on the political rights and fundamental freedom established by universal and regional treaties and political commitments. These provide a basis for the assessment of election processes by both international and domestic election observers. The principal universal legal instruments are the Universal Declaration of Human Rights (UDHR), much of

[1] a former president of Tanzania
[2] Julius Nyerere, *Freedom and Socialism* (Oxford University Press: Dar es Salam, 1968) at 110.

which has the force of international customary law, and the International Covenant on Civil and Political Rights (ICCPR), which has been signed and ratified by over 160 States and is legally binding on all ratifying countries. In addition to having legal force, these instruments have strong political and moral force. Other universal treaties also provide standards for the conduct of elections. These include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPWD).

Relevant regional instruments, agreed to by African states or as members of an international organization, include both treaties and political commitments. The organizations that have agreed such instruments include the African Union (AU), the Economic Community of West African States (ECOW- AS), the Southern African Development Community (SADC).

The history of election petitions in Kenya commenced with the advent of multi-party politics in 1992. This was by dint of Section 2A of the immediate former Constitution, which had the effect of raising political stakes in Kenya. Election petitions in Kenya are governed by the National Assembly and Presidential Elections Act[3] (hereinafter referred to as Cap 7) and rules made thereunder[4]. The burden of proof is on the person who lodges the application to demonstrate that there was an irregularity in the electoral process[5]. The burden a petitioner must meet is a balance of probability, not beyond a reasonable doubt[6]. Those election petitions that fail to meet this burden are dismissed with costs. A petitioner has to

[3] Chapter 7 of the Laws of Kenya

[4] The Commission (IIEC) is in the process of consolidating all scattered electoral laws into one legislation. A draft Elections Bill is about to be tabled before Parliament.

[5] rule 4(1)(b) of Election Rules under Cap 7

[6] *Mbuwe v Eliufoo* (1967) EA 240 at 241.

deposit Kshs. 250,000 before the petition is heard, as security for costs.

The first election petition in Kenya was the case of ***Kenneth Stanley Njindo Matiba vs Daniel arap Moi*** which was decided against a background of massive rigging allegations. The case was struck out on the basis that the petition was not signed by the petitioner himself as per the prescribed format of an election petition form envisaged under rule 4(4) of the Election Petition Rules under the Act.

In 1997, after the second multi-party elections in Kenya, the courts made a landmark ruling in the case of ***Mwai Kibaki vs Daniel arap Moi***. The petition was struck out for want of personal service against the first respondent, President Moi. This is notwithstanding the fact that no express provision for personal service is required in the Kenyan legislation. Section 14 of Cap 7 provides that the notice of the presentation of the petition is to be served on the Respondent. In fact, the section 14(2) provides alternative methods of service such as through the Respondent's appointed advocate, postage to an address provided by the Respondent or publishing in the Gazette.

The ruling however has influenced several subsequent court decisions. It is also interesting to note that the same judges who made the decision while not expressly overruling it have in recent petitions tried to mitigate its effects without coming out clearly to admit the error in the ruling of the case. The new Constitution has by dint of Article 87(3) settled this matter once and for all. The section provides that service of a petition may be direct or by advertisement in a newspaper with national circulation.

When the petition eventually goes through, politicians, especially beneficiaries of electoral fraud would use all manner of deceit in the statute books to frustrate the Judicial process. They try to evade service of petition and when served, they hire

the best of election petition lawyers who use all the legal technicalities to delay court processes, considering the lack of timelines within which these petitions should be disposed of. Some of the delay tactics they indulge in include filing of frivolous interlocutory applications, appeal against rulings, adjournments and ex parte motions. They also line up hundreds of witnesses to testify, all in a bid to waste the time of the court. In some extreme cases, some desperate litigants buy off the petitioner or witnesses of the opposing camps or threaten them to stay off the witness box. In the recent past, judges of the election tribunals have not been spared either; some are forced to disqualify themselves through threats, blackmail and other forms of intimidations.

2.0 ROLE OF THE JUDICIARY IN PROMOTING FREE AND FAIR ELECTIONS

Like any other key institution of the government, the judiciary has an important role in promoting free and fair elections in the country. As the ultimate custodians of a country's Constitution, courts must uphold the rights of the voters at all times. Judicial independence and impartiality in the conduct of court proceedings is particularly important, without which it would be difficult for an individual to ensure the protection of his or her human rights from infringement by the state. Judges therefore should be free to act on their conviction and adjudicate disputes based on their factual and legal merits and not on political considerations.

2.1 Independence of the Judiciary

Independence and impartiality in adjudicating disputes by our courts enhances public confidence. Indeed, courts worldwide have underscored the value of public confidence in the judiciary as a core component of the justice system. In the words

of Justice Katju of the Indian Supreme Court[7]:

> *"It is of upmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it, people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action."*

Judges like any other members of the public are entitled to hold their own opinions on any issue. However, their conduct should not in any way compromise the discharge of their duties. Where the judiciary is under "executive control", any petition or legal challenge against the state or its officials is futile[8].

The importance of an independent Judiciary was underlined following the disputed 2007 General Elections. The lack of confidence shown by the political class manifested by the option not to resort to courts to resolve particularly the dispute in the Presidential election came at a heavy cost. In equal measure, the then Electoral Commission was disdained and hounded by the public. This is a cost that is undoubtedly too heavy to bear again but which, happily, can be repaid through the reforming and strengthening of governmental institutions, particularly the two; the Judiciary and the Electoral Commission of Kenya.

Institutional reforms are vital in restoring judicial independence. The Constitution of Kenya makes provision for institutional changes in the judiciary similar to those made in South Africa, by establishing a Supreme Court and a Judicial Service Commission (JSC) and which required judges and magistrates to take a new oath of office. Article 172 vests the JSC power to recommend to the President persons qualified to be appointed as judges. In respect of the vetting of judges, there is a

[7] Edwin Odhiambo Abuya, *The Role of the Judiciary in Promoting Free and Fair Elections*
[8] Rok Ajulu, '"Kenya's Democracy Experiment: The 1997 Elections," (1998) 25 *Review of African Political Economy* 275 at 283.

commitment that all serving judges and magistrates shall be vetted for their suitability to serve under the new Constitution. The Vetting of Judges and Magistrates Act recently enacted sets out proposals for how this should be done. The same law further provides for the JSC to continuously facilitate the professional development of judges and judicial officers.

As noted by the Kriegler[9] Commission; that it is not sufficient for judges to possess merely "appropriate training and qualifications of the law." It went further to propose that those who preside over a contested election ought to have expertise in election law. I am happy to note that specialized training is now implemented for the judges in diverse areas, including elections. This will consequently enable courts to deal expeditiously with any possible legal objection, which would otherwise prolong the court process unnecessarily.

2.2 Timely Resolution of Disputes

Justice delayed is justice denied. Sections 19(4) and 23(6) of Cap 7 envisage expeditious disposal of election petitions, but no time limit is provided for conclusion of such cases. Many commentators argue that delays in adjudicating election petitions pose far-reaching consequences.

Firstly, delays in adjudicating election petitions have an impact on the fundamental right of citizens to choose their representatives. There are instances where petitions are delayed and finalized in three[10] to four[11] years! This also has a direct correlation to the socio-economic development of the particular electoral

[9] The Report of the Independent Review Commission (IREC) mandated to inquire into all aspects of the 2007 Kenyan general elections with particular emphasis on the presidential elections.
[10] *Shimbwa v Mwangola*, Election Petition No. 11 of 1993 (O'Kubasu, Mbito and Mwera JJ) (unreported).
[11] *Omar v Mbuzi*, Court of Appeal of Kenya at Nairobi, Civil Appeal Number 50 of 2006, delivered 27 October 2006 (O'Kubasu, Otieno, Deverell JJA) (unreported).

unit during the pendency of the petition, as there is doubt as to the legality of the serving representative.

Secondly, delayed justice denies a winning candidate the chance to represent his or her constituents in particular and the public in general. This is contrary to the social contract theory, where the electorate affirms their preference by voting in their representative when he or she offered their candidature.

Thirdly, delayed justice affects candidates on a personal level. A candidate whom a court finds to have won an election is rarely awarded damages to compensate him or her for lost income. This issue is of particular concern if the life of the current parliament is about to come to an end, as was the situation in the ***Mbuzi*** case. Even if such a candidate is awarded damages, they are typically insufficient. Conversely, a candidate whom a court finds was elected wrongly is usually not required to return the income he or she received while in office. In such cases, delayed justice leads to unjust enrichment.

Finally, if electoral disputes are not determined expeditiously, democracy itself "suffers." If an individual whom the majority did not elect represents the public, it seriously undermines the individual right to vote and be represented by a person of his or her choice. Moreover, the "slow pace" of adjudicating election petitions could fuel "cynicism about the commitment of the government and the courts to resolve electoral disputes." This cynicism is well founded because a person who has been elected improperly is perceived to have the muscle to influence the court process using incumbency resources.

Article 159(2) (b) of the Kenyan Constitution underscores the principle that courts and tribunals shall be guided by the principle of "justice shall not be delayed" when exercising their judicial authority. Thanks to the new Constitution, Kenyans

can now rejoice the time ceiling in concluding election petitions. The Constitution provides a ceiling of fourteen days and six months within which an election petition on a presidential and parliamentary election, respectively, must be heard and determined[12]. No similar provision is however provided for other elections. It is therefore up to the EMB[13] to influence legislation for a cut-off period for the parliamentary and county assembly elections.

2.3 Access to Justice without Undue Regard to Technicality

Traditionally our courts have given more emphasis to procedures and technicalities at the expense of substantive justice, particularly in election petitions. Technicalities are indeed part of the law; procedure cannot be sacrificed for substance because this too can and will lead to injustice. However, there is also injustice where a trend develops whereby the substantive content of a petition consistently fails to be addressed due to procedural technicalities; and where this injustice is engendered by legal provision, the courts have a duty to reorient practice towards substance rather than form.

Courts have in some cases used their discretionary powers not to strike out petitions where due diligence on the service was done and comprehensive affidavits of service thereto are filed. There is happily emerging jurisprudence on this front. In the case of ***Jayne Njeri Wanjiku Kihara v. Christopher L. Ajele & 2 Others***, where the Respondent, among other things, argued that the failure of the petition to state the other candidates is contrary to the format and therefore ought to be struck out. In its ruling, the court felt that this was not an anomaly that went to the substance of the petition; that it was a mere deviation from the format occasioning no prejudice on any of the parties and therefore the court can disregard it as a mere technicality as envisaged under section 23(d) of the Act. The

[12] This is in line with the recommendations of IREC Report (popularly known as the "Kriegler" Report)
[13] Interim Independent Electoral Commission (IIEC)

court also held in ***Ayub Juma Mwakesi v. Mwakwere Chirau Ali & 2 Others*** that incorrect service does not necessarily render a petition incompetent.

By dint of Article 159(2)(d), the Constitution provides that judicial authority will be exercised without undue regard to technicality. This principle is grounded on the sovereignty of the people of Kenya[14], which is vested in the judiciary and independent tribunals and must be exercised in accordance with the Constitution.

2.4 The Link Be t we e n Judiciary and the EMB

There are also some constitutional provisions that bring convergence between the courts and the EMBs with regard to election process.

Firstly, the backlog of cases in our courts is evident and despite that election disputes are to be given "priority" and now, presidential election petitions must be concluded within 6 months[15], the infrastructural and personnel capacity of the courts does not allow. As part of the institutional reforms therefore, the legislative framework must provide alternative forms of dispute resolution as envisaged under Article 159(2)(c). In addition, in furtherance of this objective, EMBs should explore the possibility of providing alternative fora for settling electoral disputes arising before or during elections; such as reconciliation, mediation, arbitration and using traditional dispute resolution mechanisms which are not repugnant to justice. Appeals from these fora can be directed to the High Court.

Secondly, the Constitution has granted the EMB the opportunity to review all the electoral legislations by incorporating best international practices, lessons learnt in the past Kenyan elections and the inclusion of progressive political rights. Of

Article 1 of the Kenyan Constitution, 2010
Article 87 of the Kenyan Constitution, 2010

particular interest is the right of Kenyans in the Diaspora to be registered as voters and to vote. The Commission[16] is studying the practice in other jurisdictions alongside the Kenyan circumstances with regard to Diaspora registration and voting. As with any new initiative, there may be teething problems once this is implemented and the courts will have to brace themselves by playing a key role in interpreting the letter and spirit of this right as envisaged by the Constitution vis-à-vis its implication on the possible infringement of one's political rights.

Thirdly, the long-awaited express constitutional declaration that allow amicus curiae to represent ordinary citizens especially in socio-economic rights, e.g. in electoral matters, environmental matters etc, is now provided under Article 22(1) of the Constitution. What remains is for the incoming Chief Justice to make rules to provide for the court proceedings to fully realize the right to standing. This provision will go along way in enhancing public participation in the judicial system and ensuring access to justice to the ordinary Kenyans.

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Fourthly, we should note that the new Constitution envisages six elective positions; the President, the constituency National Assembly representative, the county women representative to the National Assembly, the Senate representative, the Governor and the County Assembly. This is double the number that Kenya has ever had in their electoral system. The courts must in anticipation of election petitions and petitions on the infringement of political rights, prepare mechanisms to deal with these expeditiously. It is evident that the current infrastructure of the courts may not have the capacity to do so. However, the Chief Justice can assign specific judges and magistrates to deal with the specific disputes, or design special sessions made of temporary judges to fast track the petitions.

Alternatively however, wouldn't it be more practical to have an Electoral Dispute

Resolution Court with an exclusive jurisdiction over electoral disputes? The EMB shall impress upon the legislature on the need to establish this court. The effect of which will not only free our courts of incessant election petitions and ease their backlog of cases but will also enhance professional capacity of the judges and judicial officers in this court because of the specialized nature of the matters.

By dint of Article 81(b), the Constitution entrenches the gender equity in all public appointments and elective positions. It is a requirement that a two-third-gender parity be maintained. This may be easily attained in appointive positions, but not so easy when it comes to elective positions. One sure way of attaining this is through closed zipped party lists ("Zebra" lists with alternating genders) and can be attained with clear Regulations to this effect. The challenge however comes in with the independent candidates, where the winning gender cannot be anticipated until after the elections. What happens in the event that the two-third-gender parity is not attained? Is the EMB required to nullify some winners or conduct new elections to meet this requirement? This is where the courts will come in handy to give the way forward on this matter. This will be a difficult determination to make, as the courts would be required to balance between the rights of the winner and the supporters who voted them in against the need to abide by the requirements of the Constitution.

Fifthly, another point of concern is the issue of security to be deposited upon filing an election petition and costs awarded by the courts once the matter is finalized. There are those human rights voices propounding for the reduction of the current Kshs. 250,000 in order to make the electoral process more accessible to the ordinary Kenyan. In ***Jackson Ekaru Nakusa v. Paul K. Tororei & 2 Others***, the court laudably tried to give directions to the Attorney General in regard to the requirement for security deposit in order to institute an election petition. It stated that the Kshs. 250,000 required was stifling litigation in the area of election

petitions and the Attorney General ought to look into reducing the amount. On the other hand, there are opposing views urging for the increase of this amount to block frivolous petitions. The initiators of the legislation must find a balance between these two competing arguments, taking into account the presidential and other elections and the need to enhance corporate governance in election management through public participation.

Sixthly, with regard to costs awarded by courts in the election petitions, a practice is emerging in awarding exorbitantly high costs to petitioners and as against EMBs. Courts need to remember that EMBs are not profit making organizations but are publicly funded institutions that draw their monies from the exchequer. An unreasonable award of costs heavily weighs on the EMB budget and that of the country. There must be some objective criteria that will guide judges in awarding these costs and not freely left to the discretion of the courts.

3.0 CONCLUSIONS AND RECOMMENDATIONS

Election management is a costly affair for any EMB and for the country. Cost of election petitions heavily adds to this burden. It is the duty of the EMB and all the relevant organs of the state to ensure that a comprehensive legislative framework is put in place to guard against unnecessary petitions. In the past, many petitions arose due to incompetence or recklessness of the election officials, particularly the Returning Officers.

In the case of ***Nyaundi Ogari and Zephaniah Moraro Nyangwara v. Hon. Joel Omagwa Onyancha & 2 Others***, the conduct and record keeping by the ECK officials and the failure to keep all election materials in good condition for three months following an election led to the loss of vital evidence which was required

in the petition. In addition in ***Manson Oyongo Nyamweya v. James Omingo Magara and 3 Others*** and ***Ayub Juma Mwakesi v. Mwakwere Chirau Ali & 2 Others*** the incompetence of the electoral officials was comprehensively revealed. In the latter case the Judge went so far as to state that –

> *'This case is now proof that ECK deserved to be disbanded, as it was the mother of the chaos and mayhem that followed the elections of 2007.'*

As part of the legislative reforms, it is imperative that courts or other administrative mechanisms under the EMB be incorporated to deal with disputes related to election arising prior to an impending election, which may have a significant impact on the outcome of this election. An aggrieved person should not have to wait until the elections are over to invoke the courts through an election petition to have his election related grievance addressed. The case of ***Kimani Wanyoike v. Electoral Commission of Kenya & Another (Civil Application No. 213 of 1995)*** is particularly poignant in this regard. The Electoral Commission refused to accept the nomination papers of a potential candidate; the latter sought a mandatory injunction from the courts. The court of appeal dismissed the application stating that the only way to seek redress for an offence under the National Assembly and Presidential Elections Act was through the institution of an election petition. So regardless of the triviality or prejudice that a candidate is experiencing, they must bide their time until the end of the process, until an election result is announced and published, in order to seek the courts redress under the Act.

In addition, experience has shown that imposition of severe penalties for breach of the electoral code of conduct and commission of electoral offences during the campaign and voting period will greatly deter candidates from engaging in

activities that later become the subject matter of election petitions. Furthermore, the jurisdiction to hear election petitions is vested in the Supreme Court and the High Court, where Petitioners, the EMB and Attorney General will have to approach these courts for relief. This has been criticized with many suggesting that the EMB be vested with powers to apply sanctions with leave of appeal and review to the High Court. Another suggestion is the removal of the exclusive right to institute proceedings vested in the Attorney General and their extension to the EMB. This will allow the EMB to expeditiously prosecute the election offences as and when they arise.

With regard to the jurisdiction, the High Court and now the Supreme Court have sole jurisdiction over election matters with the Petitioners, the EMB and Attorney General all having to approach the High Court for relief. This has been criticized with many suggesting that the EMB be vested with powers to apply sanctions with leave of appeal and review to the High Court.

With regard to reforming the judiciary as an institution in competently addressing election disputes, I make the following recommendations –

Firstly, the court ought to play a more leadership role than a bureaucratic one. By reforming institutions of governance including the judiciary itself, this will automatically lead to an accountable, effective, transformed and transformative judiciary.

Secondly, the judiciary should play a political role in its strictest meaning of policy-making (not "playing politics"). The political choices made by the judiciary should reflect long-term change that requires contemplation, understanding and exposition of the national mood - Efforts made to stop politicization of the judiciary and the judicialization of the judiciary.

Thirdly, the judiciary must establish a set of shared core values while making decisions. This will ultimately change the nation as attitudes of the members of the society will also change. This will also go a long way in guiding the courts' discretionary power while making decisions. It will limit influences based on personal convictions and biases.

Last, but definitely not the least, there is a real need for public education on the role of the courts in general and in processing election petitions in particular. This will not only enhance public participation in the process, but also eliminate speculations and discourse that that is based on uninformed positions. The Kenyan Judiciary has made tremendous strides on this front. It has initiated annual open days where awareness is created on the court process to the general public. In addition, the National Council for Law Reporting is doing a great job in keeping their database up-to-date; it is informative with regard to Kenyan case law, various relevant publications and matters related to the profession. The recently launched tele-justice technology for the Court of Appeal cases is another but one example.

Kenya like Tanzania is a young democracy striving to achieve the peak of excellence in the corporate governance in the management of its public institutions. Reforms in electoral management in general and in the election petitions arena in particular, are one of the many initiatives. With commitment and determination within those entrusted with these responsibilities, we shall get there as they say, *a journey of a thousand miles begins with a single step*.

THANK YOU