

To,

The Clerk,  
National Assembly,  
Parliament Buildings,  
P.O. Box 41842-00100

**NAIROBI.**

**RE: RESPONSE TO PUBLIC PETITION AGAINST THE INDEPENDENT  
ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ON GROUNDS OF  
INCOMPETENCE AND LACK OF INTEGRITY**

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**1.0. PRELIMINARY ISSUES AND PARTICULARS OF THE PETITION**

1. The Petition dated 7<sup>th</sup> June, 2016 by one Barasa Kundu Nyukuri and presented to the Clerk of the National Assembly is premised on **Article 119 and Article 251(2) of the Constitution** and seeks to initiate the process of removal of the Chairperson and Commissioners of the Independent Electoral and Boundaries Commission (hereinafter **IEBC**) refers.
2. Curiously, it also seeks to initiate the process for the removal of the Secretariat staff of the Commission (the Chief Executive Officer/Secretary of the Commission and Directors of the Eight Directorates of the IEBC). Whereas the members of the Commission are State Officers appointed under the Constitution and are subject to **Article 251 of the Constitution**, the Secretariat is established by the Independent Electoral and Boundaries Commission Act No. 9 of 2011. They are thus public officers.
3. Resultantly, it is our humble view that the disciplinary procedure with regard to the Secretariat of IEBC is governed by a separate legal regime and not in the manner attempted by the Petitioner. Therefore, the Members' response is confined to issues raised against them.
4. It is our view that the Petition is incompetent, misconceived, bad in law and filed in bad faith. It is an abuse of a legitimate process vested in the National Assembly by the Constitution and as such, we wish to raise the following preliminary objections-

**1.1. Response is specific to the Petition of Barasa Kundu Nyukuri dated 7<sup>th</sup> July, 2016.**

5. We wish to state at the onset that this Response is limited to the documents which the members of the Commission were served with by the Clerk to the National Assembly, that is, the Petition by Barasa Kundu Nyukuri dated 7<sup>th</sup> June, 2016.
6. We are however aware, through media reports, that this Committee has received further information and documentation with regard to the said Petition. It is for this reason that the Members, through the Chairperson, wrote a letter to the Clerk of the National Assembly Ref. IEBC/CONF/7/1 and dated 11<sup>th</sup> July, 2016 requesting for the additional information received by the Committee as well as the hansard recording of the Committee proceedings in the Petition.
7. Due to the lack of access to the said documentation, our below response is specific to the issues raised in the only document in our possession, the Petition.

**1.2. Non-specificity**

8. The Members note with concern that the Petition, as drafted, is a blatant violation of **Article 251(2) of the Constitution** which provides as follows-

*“A person desiring the removal of a member of a Commission or of a holder of an Independent office on any ground specified in Clause (i) may present a Petition to the National Assembly setting out the alleged facts constituting that ground”.* (Emphasis supplied)

9. Our understanding of **Article 251(2) of the Constitution** is that the Petitioner is required to file a Petition in respect of each member of the Commission, whose removal he seeks, rather than presenting one omnibus Petition in respect of all the Nine (9) Members of the IEBC jointly as the Petitioner has done.
10. This was the position adopted by this Committee in its Report on the Petition for the Removal of the Chairperson and Members of the Independent Electoral and Boundaries Commission of 17<sup>th</sup> July, 2014, where this Committee took the following position-

*“On alleged serious violation of the Constitution and the Laws of Kenya, the Committee by majority found that the Petition does not specifically set out the functions of the Chairperson and Members of the Commission failed to perform or which Article of the Constitution or any other law they have violated”*

11. The attempt by the Petitioner to have the Committee consider a Petition against the Members of the Commission collectively is therefore illegal and in blatant disregard of the constitutional right of the members to a fair trial under **Article 50 as read with Article 25 of the Constitution** and the above stated finding of this Committee.

### 1.3. Lack of Evidence

12. As earlier mentioned, the Members received a Petition from the Clerk of the National Assembly which only contains bare and unsubstantiated allegations. The Petitioner has not presented to this Committee any evidence in support of his allegations.

13. Once again, the Commission is faced with a Petition that is lacking in evidence in support of the allegation that the Chairperson and Members of the Commission violated any law or Constitution in the discharge of their duties in preparation and management of the last General Elections.

14. The foregoing rests on the maxim: *El incombis probatio qui dicit non qui negat* translated to mean, he who asserts, not he who denies, must prove". The Petitioner has completely failed to discharge his burden to prove all allegations levelled against the Members of the Commission.

### 1.4. Res Judicata

15. The Members also note that certain issues raised in the Petition are now *res judicata*, that is, the issues have already been determined by other entities with the constitutional and statutory competence to do so.

16. More specifically, the Supreme Court of Kenya has had occasion to pronounce itself on the voters register specifically and the validity of the General Election of 4<sup>th</sup> March, 2013 in general. In its considered opinion, the Supreme Court in **Raila Odinga & 5 Others V Independent Electoral and Boundaries Commission & 3 others [2013] eKLR** held as follows at paragraph 306-

*“In summary, the evidence, in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evident, on the facts of this case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.”*

17. Secondly, this Committee has received and considered a Petition by one Robert Wafula Buke presented under **Article 251(2) of the Constitution** (hereinafter the **Buke Petition**), raising similar substantive complaints as the current one. Having considered the said Petition, the Justice and Legal Affairs Committee tabled its report referred to hereinabove. The facts constituting the in that Petition include, inter alia,-

- 1) That in the procurement of the Biometric Voter Registration and Electronic Voter Identification Devices (EVID) equipment during the General Elections the Commissioners so grossly mismanaged the use of public finances contrary to Article 201 of the Constitution as read with Article 10;*
- 2) The discrepancies in IEBC elections data as election returns presented to the National Assembly and posted variously by IEBC;*
- 3) Use of multiple non gazette election voter registers on the date of the election.*

18. The Committee found as follows-

*“Upon due considerations and review of the presentations and materials availed to the Committee, the Committee did not find a prima facie case established against the Chairperson and Members of the Independent Electoral and Boundaries Commission for violation of the aforesaid laws and resolved to recommend to the House that the mater together with the petition should not be recommended to the President to appoint a Tribunal”*

#### **1.5. Double Jeopardy**

19. It is trite law that a person should not be subjected to different processes on similar allegations based on similar fact. This is the rule against double jeopardy.

20. Whereas the Commission responds fully to this Petition, we are cognizant of the fact that there has been constituted a Joint Select Committee of Parliament (the Senate and the National Assembly) whose terms of reference include an inquiry into the allegations against the Members.

21. The Commission has in the past also appeared before the Public Accounts Committee on allegations which form the substratum of this Petition.

22. In the circumstances, we are of the opinion that these parallel processes will expose us to double jeopardy. This is so especially where there is a real risk of the separate entities arriving at different conclusions.

23. The Members are in a quandary as to which process they should submit themselves to.

**1.6. The Special Investigation Report by the Auditor General on the Procurement of Electronic Voting Devices for 2013 General Election of 6th June 2014**

24. The Special Investigations Report on the Procurement of Electronic Voting Devices for 2013 General Election of 6th June 2014 was prepared by the Auditor General for tabling before the National Assembly pursuant to **Article 229(7) of the Constitution**.

25. Upon receipt of the Special Investigations Report, the Commission's Chairperson filed a Constitutional Petition (**Constitutional Petition No. 356 of 2014 Ahmed Issack Hassan –v- The Auditor General**) dated 21<sup>st</sup> July, 2014 seeking inter alia, an order directing the Respondent to delete the information in the second row of Page 28 in the Special Investigation Report on the Procurement of Electronic Voting Devices for 2013 General Election of 6<sup>th</sup> June 2014 that adversely mentions the Chairperson and any other information in the said report that adversely mentions him.

26. The Constitutional Petition was majorly founded on the fact that the Auditor General had made adverse findings and conclusions about the Chairperson, in his official capacity, in the said Special Investigations Report, without according him the opportunity to be heard and to respond to the issues raised against him.

27. The Court on 29<sup>th</sup> May, 2015 directed the Auditor General to delete the information in the second row of Page 28 in the said Special Investigation Report that adversely mentioned the Commission Chairperson and any other information in the said report that adversely mentions him.

28. The same principle should be applicable to the entire Commission and Secretariat adversely mentioned in the Special Investigations Report.

29. The Auditor General is yet to execute this Order of the High Court yet the Petitioner has relied on the same.

*(Annex 1 – Judgment and Decree of the High Court in Constitutional Petition No. 356 of 2014 Ahmed Issack Hassan –v- The Auditor General)*

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### **1.7. Public Accounts Committee Report**

30. We note with concern that the Petition has placed inordinate reliance on the Public Accounts Committee Report which was tabled in National Assembly but is yet to be adopted.
31. When the IEBC commissioners appeared before this Committee to respond to the Public Account Committee Report, we were informed that the same had not been adopted by the National Assembly and subsequently, the Committee would not interrogate the detail of the Report.
32. With that intimation in mind, this Committee should not rely on the said Public Accounts Committee Report.

### **1.8. Whether these proceedings are inquisitorial or adversarial.**

33. The Members are at pains to determine whether the procedure of this Committee is inquisitorial whereby the Committee is the accuser or adversarial, in which case the Commission would have had the opportunity to test the evidence presented by the Petitioner.

### **1.9. The Petitioner**

34. Whereas the Commission notes the claim by the Petitioner's as to his work experience and alleged expertise in electoral management as intricately elaborated in the Petition we wish to bring to the Committee's attention the Commission's previous interactions with the Petitioner so as to put the Petitioner's assertions as to his alleged expertise into proper perspective.
35. Firstly, the IEBC, is the only constitutionally mandated body to conduct or supervise election and referenda. The IEBC is thus endowed with intimate knowledge of matters elections. The IEBC is completely unaware of the Petitioner's expertise in electoral matters. He is neither nationally, regionally nor internationally renowned as alleged. The Petitioner's name is absent from all known databases of regional and international electoral experts (ACE Network, UNDP, African Union/European Union, IGAD, COMESA/EAC, IEBC). As such, the Commission has never engaged his services as an expert, consultant or otherwise. We are not aware of any gainful employment the Petitioner is engaged in.
36. We also note the Petitioner's so-called involvement with the IEBC during the Bungoma Senatorial election petition, **Musikari Nazi Kombo v Moses Masika Wetangula & 2**

others [2013] eKLR. We wish to bring to the Committees attention to the finding of the High Court in respect of the Petitioner's evidence in that election petition (Paragraph 151)-

*“During the course of proceedings, it was clear in his evidence and demeanour that he was visibly inclined towards arguing the Petitioner’s case rather than helping the court to analyse the electoral process that was employed in the election in question. The court is aware that he had been nominated to represent the Petitioner in the scrutiny and recount exercise but that was resisted by the Respondents. He, therefore, removed himself from the privileged position of being an expert witness. His evidence will, therefore, be treated as such with the usual caution attending other witnesses.”*

37. Curiously, his lawyer, Mr. Alfred Ndambiri is a former Commissioner of the defunct Electoral Commission of Kenya and was the Advocate on record for the Petitioner (Musikari Kombo) in the Wetangula case (Supra).
38. It is therefore our opinion that the Petitioner is a busy-body whose claim to fame is the instant Petition and crafting unfounded allegations against the IEBC.
39. In the context of the foregoing concerns, our response to the Petition is as follows--

## **2.0. THE MANDATE OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

40. **Article 88(1) of the Constitution** establishes the Independent Electoral and Boundaries Commission. The Commission is recognised as a Constitutional Commission in Chapter 15 of the Constitution. Pursuant to **Article 249(2)**, it is subject only to the Constitution and the Law and is independent and not subject to the direction or control by any person or authority.
41. **Article 88 (4) of the Constitution** as read with **Section 4 of the Independent Electoral and Boundaries Act** confers upon the Commission the exclusive responsibility to conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament.
42. In particular, **Article 88(4)** provides for the mandate of the Commission with regards to—
  - (a) *the continuous registration of citizens as voters;*

- (b) the regular revision of the voters' roll;*
- (c) the delimitation of constituencies and wards;*
- (d) the regulation of the process by which parties nominate candidates for elections;*
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*
- (f) the registration of candidates for election;*
- (g) voter education;*
- (h) the facilitation of the observation, monitoring and evaluation of elections;*
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- (j) the development of a code of conduct for candidates and parties contesting elections; and*
- (k) the monitoring of compliance with the legislation required by **Article 82 (1) (b)** relating to nomination of candidates by parties.*

### **3.0. THE GROUNDS FOR REMOVAL**

43. **Article 251 (1) of the Constitution** provides for the grounds upon which a member of a Commission may be removed. The Petitioner has alleged two grounds for the removal of the members of the Commission, that is-

- Incompetence; and
- Lack of Integrity

#### **3.1. Incompetence and Lack of Integrity**

44. The Petitioner alleges that the Commissioners are incompetent and lack integrity for various broad reasons. We wish to point out that there has been no finding on the lack of integrity of any member of the IEBC by the body constitutionally mandated to make such a finding. Moreover, we are inclined to believe that the allegation of incompetence cannot be leveled against the Commissioners collectively. It can only be made as against an individual, with the necessary evidence in support of the same.

45. We further observe that the Petitioner has not distinguished the two grounds as the allegations in support of the grounds are so muddled up in the Petition. Therefore, our response will this be confined to the broad allegations as follows:

##### **3.1.1. Employment and Recruitment of Staff**

46. The Report of the Independent Review Committee (Kriegler Report) made the following observation on the recruitment of secretariat staff-

*“In the recruitment of temporary election officers, commissioners should vet the recruitment of returning officers only: they should establish clear procedures for the recruitment of other staff and ensure these are strictly implemented.”*

47. This finding above informed the decision to amend **Section 41(a) of the Former Constitution** thereby giving the Interim Independent Electoral Commission (IIEC) the exclusive authority to establish an effective and efficient secretariat.

48. It is with this background that the IIEC embarked upon the recruitment of senior staff through a competitive and transparent process which process was facilitated by the globally respected recruitment firm, KPMG. Subsequently, the IEBC employed the services of PriceWaterhouseCoopers in filling vacancies in top-level management.

49. The Commission also adopted a Human Resource Policy to govern the recruitment processes of all other secretariat employees.

50. The Commission Policy is that the secretariat staff were to be employed from their constituency whereupon the member of staff then becomes a public officer deployable anywhere in the country. The decision of the Commission to deploy the Constituency Elections Coordinator back to their home counties (not the individual’s constituency) during the recently concluded mass voter registration exercise, was aimed at boosting voter registration as it was noted that the staff were able to aptly communicate with the members of the public during the voter registration campaigns and mobilize people to register as voters and not to rig elections as alleged.

51. Consequently, the assertion by the Petitioner that Directors, Managers, Regional Coordinators and Constituency Election Coordinators were not recruited through a very competitive and transparent criteria and system is denied in its entirety.

### 3.1.2. Legal Representation

52. The Petitioner alleges that exaggerated legal fees were paid to some “preferred/ favoured law firms” during the election petitions, especially the Presidential Election Petition.

53. The Commission has a pre-qualified list of legal service providers developed in accordance with the Public Procurement and Disposal Act from which it instructs

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lawyers to represent it in the various court matters. It is from this pre-qualification list that the Commission engaged the services of the Advocates to represent it in the Petitions. Where there is dearth of expertise, the Commission resorts to the pre-qualification lists of other public bodies in accordance with **Section 32 of the Public Procurement and Disposal Act**.

54. In response, we wish to state that the procurement of legal services was conducted within the statutory provisions governing procurement of services by public bodies. An audit of the process was conducted and the procurement process was vindicated. As a result, legal fees due to the suppliers of legal services and consultancy were duly settled.

### **3.1.3. Election Date**

55. The Petition raises issue with the decision of the IEBC to set the date of the 4<sup>th</sup> first elections under this Constitution.

56. The decision of the IEBC was informed by the decision of the High Court of Kenya in Constitutional Petition No. 65 of 2011 between **John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR** in which matter an interpretation of **Articles 101, 136(2) (a) 177(1) (a) and 180(1) of the Constitution** which deal with the general elections was sought.

57. The High Court held that the mandate of determining the date of the first election under this Constitution lies squarely with the IEBC.

58. It is on this basis and not any other as alleged by the Petitioner, that the IEBC, in its capacity as the constitutional successor of the IIEC, determined and declared that the date of the general election was 4<sup>th</sup> of March, 2013.

### **3.1.4. Election Results**

59. The IEBC is mandated by **Article 86 (b) and (c) of the Constitution** to ensure that the votes cast at an election are counted, tabulated and the results announced promptly by the presiding officer at each polling station. The results from the polling stations are then openly and accurately collated and promptly announced by the returning officer. This position was affirmed by the **Supreme Court of Kenya in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR** when it held that the declaration of results is by the Returning Officer.

60. In response to the allegation that there were variations in the election results announced by the IEBC, the members wish to state that the Petitioner is being dishonest with the facts.
61. The Commission published the results pursuant to **Article 86 (b) and (c) and Article 138 (3) (c) and (10) of the Constitution**. All stakeholders were constantly informed of the procedures leading up to the announcement of the results of the general elections. This process also involved party agents.
62. It should be noted that there were slight variances between the valid votes cast for the presidential elections and those cast in other elective positions. For instance, as regards the valid votes cast for Member of County Assembly, the variance was occasioned by the fact that there were twelve (12) uncontested County Assembly Wards and thus no ballot papers were printed for those wards. Further, the election in three (3) County Assembly Wards were postponed for various reasons. See tabulation below-

No	Elective Position	Valid Votes	Other Elective posts variance with Presidential valid votes
1	President	12,221,053	-
2	Member National Assembly	12,194,562	26,491
3	Women Member of National Assembly	12,101,568	119,485
4	Senator	12,131,294	89,759
5	Governor	12,162,733	58,320
6	Member of County Assembly	12,057,023	164,030

*(Annex 2 – Copies of Gazette Notices No. 2909 & No. 2928 of 1<sup>st</sup> March, 2013 on Uncontested and Postponed Elections respectively)*

### 3.1.5. Donation of BVR and other equipment to Burundi

63. The Petitioner alleges that the Chairperson of the IEBC unilaterally transferred BVR Kits to Burundi on instructions from the Head of Public Service. This cannot be further from the truth.
64. The Commission transferred 150 laptops to the Ministry of Foreign Affairs. The laptops were obtained from the stock of 30,000 laptop-based EVIDs.
65. The Commission approved the transfer in principle and with directions to the Disposal Committee who approved the disposal on the basis that the devices were in any event obsolete and would not serve the Commission in the future elections.
66. *Obsolescence* does not mean unusable but rather ‘not fit for purpose’. The laptops were in good working condition but not fit for conducting elections in 2017. That is the reason why the Commission is in process of procuring new EVIDs to ensure credible 2017 General Elections.
67. The Secretariat followed the public procurement and disposal procedure that prescribes transfer to another public entity as one of the methods of disposal pursuant to **Section 129 (3a) of the Public Procurement and Disposal Act, 2005**.
68. The Commission made the decision independently after taking into consideration all the necessary factors including consultations with the Government of Kenya.
69. In addition, the systems software (AFIS – Automatic Fingerprint Identification System) and applications were removed from the laptops. The equipment transferred to the Ministry of Foreign Affairs were therefore empty shells without any data or software in them.
70. Furthermore, it is not uncommon for Election Management Bodies in Africa to share election material and equipment. The transfer may include transfer of election material, equipment and human capital. In SADC, the South African Electoral Commission shares electoral material with the Democratic Republic of Congo, Angola, Namibia, Mozambique and Botswana. In ECOWAS, Nigeria and Ghana also assist smaller Election Management Bodies in the region. Naturally in the East African Community, IEBC is looked up to provide electoral support to our neighbors, through the EAC Electoral Commission Forum which brings together all EMBs in the region.
71. The donation was made under the framework of the East African Community, through the forum of Electoral Management Bodies (EMBs), to support partner states in

technical electoral assistance in furtherance of the EAC's ultimate goal of attaining political federation. Other countries in EAC were also approached by Burundi for support.

72. It is therefore common practice and not a sign of incompetence or lack of integrity as alleged.

*(Annex 3 – Documents relating to the transfer of Laptops to Burundi)*

### **3.1.6. Investigation and prosecution of electoral offenders**

73. The Commission is constitutionally mandated to investigate and prosecute election offences by candidates, political parties or their agents pursuant to **Article 157(12) as read with Article 252 of the Constitution**. This role is operationalized by **Section 107 (2) of the Elections Act** which empowers the Commission to prosecute any offence(s) under the Elections Act 2011 and impose sanctions against persons who commit such offences.

74. In discharging this mandate, the Commission collaborates closely with the Office of the Director of Public Prosecution (ODPP) and the National Police Service which entities are bestowed with the primary roles of prosecution and investigations respectively. The investigatory and prosecutorial role of the IEBC is thus residual.

75. Despite the minimal resources available for the execution of this mandate, this collaborative effort resulted in the handling of a total of 86 cases during the March 4<sup>th</sup> General Elections.

76. With regards to the Wetangula case, the **Supreme Court of Kenya in Petition No, 12 of 2014 between Moses Masika Wetangula and Musikari Nazi Kombo & 2 Others** made a finding that Moses Masika Wetangula, committed the election offence of bribery and treating during the March 4<sup>th</sup> General Election. The report of the above finding of the Supreme Court was gazetted by the Speaker of the Senate in Gazette Notice No. 7852 of 23<sup>rd</sup> October, 2015.

77. Pursuant to **Section 87(3) of the Elections Act (the Act)**, upon the said gazettelement, the Commission was mandated to consider the report and delete from the register of voters, the name of the person who is disqualified from being registered in that register of voters. It should be noted that this was the first time an Electoral Management Body was discharging this role in the history of this Republic. The lack of clarity in the

governing legislation has informed the push by the Commission and this Committee to propose amendments to the governing legislation.

78. The IEBC Dispute Resolution Committee accorded Mr. Moses Masika Wetangula a hearing before the Committee in a bid to safeguard his unalienable right to be heard. The said Committee found as follows-

*In the premises, considering the material before us, the obtaining legal instruments and provisions, the highlighted lack of clarity in legislation and the relevant jurisprudence, we find that-*

- I. *The political rights of a citizen may only be limited in a manner contemplated under the Constitution, and in particular must meet the test of being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors*
- II. *Senator Moses Wetangula has not been charged or convicted of any election offence*
- III. *There is urgent need as directed by the Supreme Court to have legislative realignment to cure the apparent lack of clarity in the provisions of Section 87 of the Elections Act.*

*(Annex 4 - Finding of the DRC Committee on the case against Mr. Moses Masika Wetangula)*

79. Notably, this decision has not been challenged in any court of law by any person.

### **3.1.7. Boundaries Delimitation**

80. The Petition does indeed acknowledge the IEBC's exclusive role to review electoral boundaries as provided by **Article 89(2) & (3) of the Constitution** mandates IEBC to review electoral boundaries.

81. To ensure equity and efficiency in representation, the delimitation was founded on the criteria set out in **Article 89(5)**, that is,

*The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—*

- (a) geographical features and urban centres;*
- (b) community of interest, historical, economic and cultural ties; and*
- (c) means of communication.*

82. The Commission successfully undertook boundary delimitation of 1450 Wards and 290 Constituencies. This was after extensive public participation throughout the Country pursuant to **Article 89(7) of the Constitution**. Out of the 1740 boundaries that were delimited, only 145 were challenged. Some challenges were on such minor issues as the name of the ward/constituency.

83. As pointed out by the Petitioner, several applications for review were filed at the High Court and subsequently to the Court of Appeal. It should be noted that it is well within the rights of any person to access a court of law to seek redress. The Commission has no control whatsoever in the number of petitions and/or review applications lodged by aggrieved persons. The number of boundary delimitation reviews filed cannot thus be equated to the level of competence of the IEBC. The mere fact that a few people may have been dissatisfied with the manner in which electoral boundaries were delimited by the IEBC, in and of itself, does not render the IEBC incompetent.

84. The IEBC's exclusive role in boundaries delimitation was further emphasized by the Court of Appeal in **Shaban Mohamud Hassan & 2 others v Shaban Mohamud Hassan & 3 others [2013] eKLR** who set aside a decision of the High Court purporting to reconstitute and re-arrange certain wards opined as follows-

*“We hold that it was not even open for the court to rely on the proposals of the applicants in that application as that was the province of the IEBC, that alone was mandated to subject those proposals to the yardstick enumerated under Article 89 (5).”*

85. The High Court in **Republic V Independent Electoral And Boundaries Commission & Another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 Others [2012] eKLR** also affirmed the mandate of the IEBC in delimitation of boundaries, expressing itself thus-

*“The IEBC has the constitutional mandate to balance all the relevant factors and considerations in delimiting constituencies and wards. Consequently, when an application is made under Article 89(11), this court has power to test the application of the Constitutional criteria employed by the IEBC and where found wanting the court will intervene to restore the proper constitutional balance.”*

*(Annex 5 - Judgement of the Court of Appeal in Shaban Mobamud Hassan & 2 others v Shaban Mobamud Hassan & 3 others [2013] eKLR)*

86. Pursuant to **Article 89(2) of the Constitution**, constituency boundaries can only be reviewed at intervals of not less than eight years, and not more than twelve years. The next delimitation of constituency boundaries is therefore expected to take place in the year 2020 at the earliest after the Census to be conducted in the year 2019.
87. Upon gazetting its Final Report on Delimitation of boundaries on 6<sup>th</sup> March, 2012, the IEBC became *functus officio* as regards boundaries delimitation. It cannot therefore engage in activities that suggest a possible review of boundaries as the Petitioner seems to suggest.

### **3.1.8. Voter Registration and updating of a Principal Register of Voters**

88. The Constitution of Kenya mandates the IEBC to carry out continuous registration of citizens as voters and regular revision of the voters' roll with an objective of establishing a comprehensive, accurate and complete Principal Register of Voters. **Section 2 of the Elections Act** defines the Principal Register of Voter as

*“a current register of persons entitled to vote at an election prepared in accordance with section 3 and this includes a register that is compiled electronically”.*

89. In the run up to the March, 2013 General Elections, the IEBC registered 14,388,781 voters (14,352,545 biometric and 36,236 non-biometric) in 24,563 registration centres (2637 in Diaspora – East African Community) in 30 days. This is the principal register of voters after the inspection which was used in the 2013 General elections and all other subsequent by-elections. In doing so, the IEBC deployed the Biometric Voter Registration (BVR) System during voter registration in exercise of its mandate under **Articles 86 and 88(4) of the Constitution**, and **Section 4(m) of the Independent Electoral and Boundaries Commission Act**, to adopt appropriate technology in the performance of its functions
90. The Principal Register of Voters was opened to the Public for inspection and upon verification, was certified by the Commission on 18<sup>th</sup> February, 2013 in Gazette Notice No. 2222 of 18<sup>th</sup> February, 2013. A copy of the Principal Register of Voters was also availed to political parties.

*(Annex 6 - Copy of the Gazette Notice No. 2222 of 18<sup>th</sup> February 2013 certifying the Register)*

91. Contrary to the Petitioner's assertion, the EVID System was deployed for the sole purpose of providing an additional layer of efficiency and integrity in the electoral processes and not to replace the legally required manual system of voter identification.
92. These efforts by the Commission were to ensure that all eligible citizens of Kenya are able to register as voters, and able to vote during elections pursuant to **Articles 10(a), 10(b), 38(3)(a), 88(4)(a), 138(3)(a) of the Constitution**, which also express the values and principles of democracy and the participation of the people.
93. This clarification on the issue of the Principal Register of Voters was readily accepted and endorsed during the Presidential Election Petition between **Raila Odinga –v- IEBC & 4 Others** where the Supreme Court at paragraph 252 of its judgment found as follows in respect of the voters register:-

*“We are inclined to accept the explanations given by the 1st and 2nd Respondents, of the mode of compilation of the voters’ roll. The depositions of the 2nd Respondents and of Immaculate Kassait, and especially when taken alongside the submissions of learned counsel, Mr. Nyamodi, have conveyed a credible account on the manner in which the voters’ register used in the 4th March, 2013 Presidential election, was prepared. The legal burden of showing that the voters’ register as compiled and used, was in any way in breach of the law, or compromised the voters’ electoral rights, was not, in our opinion, discharged by the Petitioners.”*

94. To our minds, which opinion the Supreme Court of Kenya adopted, the register used during the March 2013 General Election does not impute any culpability on the part of the Commission. The Supreme Court of Kenya gave the Voter Register a clean bill of health. Voter registration was thus conducted in full compliance with the provisions of the Constitution, the Elections Act, and the Elections (Registration of Voters) Regulations, 2012.
95. Despite several allegations in different forums, we note that no other registers have ever been presented before this Committee or in any other forum. The allegation that there were multiple registers is thus unfounded. It is the Commission's position that there is only one Principal Register of Voters as per **Section 4 of the Elections Act** which is comprised of-
- Poll Register
  - Ward Register

- Constituency Register
- County Register
- Register of Voters residing outside Kenya

96. After the 2013 general election, the Commission availed the Principal Register of Voters to the Institute of Education and Democracy (IED), on its request, to conduct an independent audit of the Principal Register of Voters. After conducting its audit and analysis, the IED registered the Principal Register of Voters as 99.8% accurate.

*(Annex 7 – IED Report)*

97. Furthermore, it is the Commission’s mandate to register voters continuously. Following the completion of the general election of the year 2013, the Commission embarked on the regular revision of the Voter’s Register in accordance with **Article 88 (4)(b)**. The process of regular revision includes the deletion of dead voters, enrollment of new voters, change of particulars and transfer of voters. In this regard, upon collection of data, the Commission is in the process of updating the information onto the database.

*(Annex 8 – Extract of current status of voter registration)*

98. Before certification, the register will be subjected to inspection in August 2016. The changes will then be incorporated. It is important to understand that updating of the register is a continuous process that is expected to end within the provisions of the law.

### **3.1.9. Procurement of election materials**

99. The Petitioner expressed concerns over the manner of procurement of the Biometric Voter Registration (BVR) Kits. We are aware that the procurement of the BVR kits was executed on a Government to Government basis between the Government of Kenya and the Government of Canada. This was therefore beyond the Commission’s mandate.

100. Nonetheless, the procurement function of the IEBC falls within the mandate of the Secretariat, headed by the Chief Executive Officer/ Commission Secretary pursuant to **Articles 226 (2), 227 and 250 (12) of the Constitution, Sections 10, 11, 12 and 13 of the IEBC Act, Sections 66 & 68 the Public Finance Management Act and Sections 27, 38 and 44 the Public Procurement and Disposal Act**. The Petitioner has heavily relied on the Public Accounts Committee Report and the Commission has had occasion to share its views on the same.

*(Annexure 9 & 10 – Letter to the Clerk of the National Assembly dated 1<sup>st</sup> December, 2015 and The Commission’s Response to PAC of 17<sup>th</sup> May, 2016.)*

101. We wish to categorically state that the members are unable to respond to the detailed allegations in the Petition as our role in procurement is limited to approval of the budget and procurement plan. The Accounting Officer of the Commission is the Chief Executive Officer who is also the Head of the Secretariat.
102. Moreover, the Petition acknowledges the fact that there are ongoing investigations on the procurement by the IIEC of Ballot Papers for the Shinyalu, Bomachoge, South Mugirango and Matuga Parliamentary and Civic By-Elections and the Referendum, Voter Registration Cards, OMR Correction and Nomination Forms, Elector's Card Pouches and Ultra violet lights and Other Parliamentary and Civic Ballot Papers. This investigation is being conducted by the Ethics and Anti-Corruption Commission in collaboration with Britain's Serious Fraud Office. We will therefore refrain from commenting on the ongoing investigations so as not to prejudice the said investigations.
103. As a reminder to this Committee, nothing has since changed since our last appearance before this Committee. We quote paragraph 4.0 (iii) of this Committee's Report on this aspect-

*"On alleged mismanagement of public finances contrary to Article 201 of the Constitution as read together with Article 10 of the Constitution in procurement of the Biometric Voter Registration (BVR) and Electronic Voter Identification Devices (EVVID), the Committee by majority found that BVR and EVVID are matters of procurement and several officers of the Commission have been charged in court in Nairobi in Anti-corruption case no. 16 of 2013 as evidenced in the charge sheet presented by the Commission, In this matter the Commissioners are listed as prosecution witnesses"*

### **3.1.10. Irregularities in the elections of 4<sup>th</sup> March, 2013**

104. During the General Elections held on the 4<sup>th</sup> of March, 2013, the IEBC was a young institution working within a new legal framework that had to prepare for six elections, including for three newly created elective positions. It must be appreciated that challenges are bound to arise in the circumstances.
105. On Election day, the IEBC employed the use of Electronic Voter Identification Devices (EVVID), and the Electronic Results Transmission System (ERTS) for the first time in March 2013 elections in an effort to enhance the credibility of the elections.
106. Technology is implemented in the electoral process to enhance the efficiency of the Electoral processes. The BVR system was used to capture voters details in the registration centers, process the same to eliminate duplicates and generate the Principal

Register of Voters. This system worked well and was used to generate the voters register used in the 2013 General Election.

107. The EVID system was designed to enable identify voters during voting process in order to eliminate cases of voting by proxy and ensure that voters who appear at the polling station are able to cast their voters. It enhances the efficiency of searching and identifying voters using the biometric details. This system works hand-in-hand with the printed register as the control records since it has all the voters' details including the passport photo for identification. The printed register acts as the backup and for quality control during voting process.
108. The RTS system was designed to enhance the efficiency of transmission of provisional results from the polling station to the tallying centers. The Elections Act provides that the final results of an election shall be tabulated on the statutory forms 34, 35, 36, 38 and the results are announced based on these forms. It is worth noting that technology only enhances the efficiency of a process and was not meant to replace the legal process of tallying election results. The challenges experienced by the RTS are well documented in the Post-election Evaluation Report. The statutory forms filled by the presiding officers and signed by the agents were used to tally the results thus the electoral process was never compromised.
109. The IEBC faced certain challenges in the conduct of the said General Elections. The EVID and ERTS experienced some challenges. However, the challenges faced by the EVID system did not compromise the integrity of the voting process since voters were identified using the printed register. The ERTS did not work to optimal standard.
110. The system has however since worked optimally for all subsequent by-elections.
111. It is our position that these challenges did not affect the credibility of the said elections. The IEBC has since the General Election of 4<sup>th</sup> March 2013, put in place measures to address these challenges.
112. The Supreme Court, in its judgment in the Raila case (Supra), found that the elections were conducted in compliance with the relevant Constitutional provisions and the law. This finding is therefore applicable to all the elections held at the same time as that presidential election.
113. In response to the allegation that party agents were thrown out of the tallying centre, we wish to clarify that party agents were actually given a room to work from and not ejected from the tallying centre as alleged.

### 3.1.11. Administrative Issues

114. This allegation by the Petitioner remains unsubstantiated. We urge this Committee to divest itself of the request by the Petitioner to delve into baseless rumors, corridor gossip, bar talk and unconfirmed reports. The Petitioner has perfected the act of making these kind of allegations. The Petitioner can exercise his right under **Article 35 of the Constitution** to access any information he may require from the Commission.

115. The Commission has however undertaken structural reviews to improve efficiency and productivity. These are nevertheless not informed by the rumors perpetrated by the Petitioner in any way.

### 3.1.12. Management of Political Parties and Political Party Nominations

116. In pursuance to the Commission's mandate as provided in **Article 88 (4)(d),(f) of the Constitution**, the Commission is responsible for the regulation of the process by which parties nominate candidates for elections and the registration of candidates for election.

117. We note that at the material time, there was a lacuna in the law with **Section 13 of the Elections Act** providing for nomination to be conducted exclusively by the political parties pursuant to their nomination rules and constitution. **Section 27 of the Act** merely provides that the political parties shall submit its nomination rules to the Commission at least three months before the nomination of its candidates, which rules are a creature of the Political Parties Act.

118. Therefore, whereas it may seem that the IEBC has regulatory or supervisory powers in political party nominations, the process is conducted entirely by the political parties. The IEBC therefore had a very minimal role in the political party nominations in the general elections of 4<sup>th</sup> March, 2013.

119. Parliament also revised the timelines for submission of party membership lists from three months to 45 days prior to the election and the period for party membership prior to nomination was reduced from a minimum of three months to only being required to be a member of a party on the day of nomination. These amendments had a definite ripple effect on the management of the entire electoral process.

120. Further, during the March, 2013 General Elections, crucial legislation on campaign financing and expenditure had not been passed by Parliament. This weakened transparency and accountability of party processes.

121. Whereas the Commission has the regulatory mandate over political party nominations, the independence of the political parties has to be preserved. The primacy of the role of the political party in party nominations cannot be understated.
122. The Petitioner, rightly so, acknowledges the overlapping mandate between the IEBC Dispute Resolution Committee under **Article 88 (4)(e) of the Constitution** and the Political Parties Dispute Tribunal (PPDT). This resulted in forum shopping and duplication of roles by the two bodies.
123. The IEBC is on record as having taken the position that it is for Parliament to address the said overlap of mandates so as to ensure that the PPDT and the IEBC are able to operate efficiently.
124. As part of its reforms, the Commission is developing regulations on the process by which parties shall nominate candidates for elections, including a proposed amendment to **Sections 27 and 28 of the Elections Act** contained in the **Election Laws (Amendment) (No. 3) Bill, 2015**. These are aimed at increasing the period of submission of political party nomination rules and providing the Commission the mandate to review the same in accordance with prescribed regulations. The proposed amendments also aim to increase the period for submission of party membership lists to one hundred and twenty days before the date of the election.

### **3.1.13. Voter Education**

125. **Article 88 (4) (g) of the Constitution** mandates the Commission to conduct voter education. The Commission intended to provide adequate voter education for effective participation by the citizens in the electoral processes and for them to clearly understand their rights and responsibilities in the electoral process.
126. The new Constitution brought with it major changes in the governance structures by introducing the principle of devolution. There were also multiple changes to the electoral system. Despite the novelty of the process, voter education was efficient. The output is evidenced by the following performance indicators: there was approximately 86% voter turnout in the 2013 general elections, registration of 14 million voters in 30 days and in the presidential election, only about 108,000 out of over 12,000,000 total votes cast were spoilt votes (less than 1%).
127. Funding for voter education by the Government is generally low. However, we managed to employ 2 voter educators per ward, developed a voter training manual and engaged the media in voter education with the help of the civil society.

### 3.1.14. Electoral Observation and Monitoring

128. In accordance with **Article 88(4)(h) of the Constitution** the Commission is mandated to facilitate observation, monitoring of the elections. In so doing the Commission accredits International and Domestic observers.

129. In total the Commission accredited 2,600 international and 28,556 domestic observers. The commission also accredited 5,000 international and domestic media personnel. These included the observers mentioned by the Petitioner in the Petition, that is, the African Centre for Open Governance (AfriCOG), the Law Society of Kenya and Election Observer Group (ELOG).

130. This accreditation allows the observers to access polling stations, tallying centres and obliges them share their reports with the Commission. However, this does not allow observers access to election materials which is categorized as an election offence. The claim that the observers were denied a list of polling stations is false. Observers were given all the necessary assistance within the Commission's capabilities.

131. We refer this Committee to the following observations of some observers-

***ELOG:***

*“Despite the many serious problems such as widespread malfunctioning of electronic verification kits witnessed during the E-Day, the PVT exercise determined that the process was generally credible. It is on the basis of this that ELOG utilized the PVT data to project and verify the accuracy of the presidential results. The PVT verified that the results announced by the IEBC were within the range projected for each of the presidential candidates”.*

***EUROPEAN UNION:***

*“The 2013 Kenyan General Elections took place following major reforms and massive society-wide efforts for the elections to be peaceful, transparent and credible.*

*Further, that: Overall though, EU observers found that the IEBC and its staff succeeded in overcoming the technical and operational difficulties that arose on Election Day to ensure that the Integrity of the vote was protected”.*

**COMMONWEALTH:**

*“Overall the Independent Electoral and Boundaries Commission faced a challenging task in preparing for the elections, including having to undertake a national delimitation of constituency boundaries and a biometric voter registration, while also preparing for six elections. While the IEBC did experience some problems during the transmission and tallying of results overall it performed well and operated in a transparent manner”.*

**COMESA:**

*“Though there have been challenges relating to the verification of voters, the Mission concludes that the 2013 General elections met regional, continental and international standards for credible and transparent elections”.*

132., The Commission received a Report from ELOG confirming that the elections were peaceful, transparent, and credible and reflected the will of the people. ELOG had conducted a Parallel Vote Tabulation (PVT), which confirmed the results announced by the Commission. To quote,

*“Despite the many serious problems such as widespread malfunctioning of electronic verification kits witnessed during the E-Day, the PVT exercise determined that the process was generally credible. It is on the basis of this that ELOG utilized the PVT data to project and verify the accuracy of the presidential results. The PVT verified that the results announced by the IEBC were within the range projected for each of the presidential candidates.”*

*(Annex 10 - PVT Report by ELOG)*

133. Therefore, the Petitioner’s assertion that the election observers were not well facilitated is fictitious.

**4.0. CONCLUSIONS**

134. The Commission contends that the Petition has no merit and/or basis and lacks foundation both in fact and in law and as such ought to be dismissed as being incompetent and an abuse of the legal process. This petition should be dismissed for failing to meet the constitutional threshold underlined in **Article 252 (1) of the Constitution.**

135. It is a veiled attempt by the Petitioner to canvass the issues raised and determined by the Supreme Court of Kenya. It contains no evidence, just bare allegations. In Paragraph 6.2 of his Petition, the Petitioner states as follows-

***“Ultimately, the most significant challenge from a public trust standpoint is the failed implementation of the IEBC’s technological investments in the electoral process and the cloud of illegitimacy that hangs over the results of the 4 March 2013 general election – especially in the presidential elections.”***

136. It is our humble view that such statements are an indication of the Petitioner’s blatant disregard and disrespect for the Rule of Law and especially for the Supreme Court of Kenya which heard and determined the presidential elections. We encourage this Committee to shy away from entertaining such statements.

137. Despite having operated within the law in an open and transparent manner, this Commission has since the elections of 4<sup>th</sup> March, 2013 been subjected to many inquiries, audits and investigations, the highest in the history of electoral management bodies in Kenya. Its working environment has constantly been compromised and poisoned by continuous baseless allegations against commissioners and secretariat.

138. This Petition is a repetition of the Petition filed by Wafula Buke to this Committee as well as the challenge to the presidential election petition in the Supreme Court of Kenya. The commission has been addressing the same issues *ad infinitum ad nauseum*

139. The Commission excelled against all odds, conducting six elections in a single day while incorporating novel technologies amidst negative energy and political pressures from both sides of the political divide.

140. The IEBC has had various interactions with Electoral Management Bodies in Africa as well as the rest of the world with a number of them conducting benchmarking programs with the highly-regarded IEBC (Uganda, Tanzania, Zanzibar, South Sudan, Zimbabwe, Zambia, Namibia, Malawi, Ghana, Nigeria, Yemen & Nepal). To further buttress the high standing and high level of respect of the IEBC among its peers, the body as well as its members have been elected to various bodies such as the Chairperson of the Executive Committee of the Association of African Election Authorities ; Chairperson of the Commonwealth Election Network; Member of the Executive Board of the Association of World Elections bodies, International Centre for Parliamentary Studies award. It would be a sad commentary of the Kenyan political process if this Committee decides, to allow the Petition for political expediency.

141. We are further concerned by the timing of the Petition which we find suspect. The Petitioner has held on to his complaints since the year 2013, only for them to arise at this juncture. We opine that the Petitioner is suffering from the Biblical “Lot’s wife syndrome” ; looking back at 2013 instead of looking forward to 2017.

142. The Commission is aware it has been receiving negative publicity and has been constantly subjected to a public trial. We urge this Committee not to be influenced or prejudiced by this negative publicity and remain focused on the facts and law before it.

143. This Commission is a nascent institution. It should thus be allowed to grow and mature. If this Committee was to recommend disbandment, it would cause irreparable damage and this would be prejudicial to public interest. This committee should abstain from focusing too much on the headlines of tomorrow and thereby losing sight of the judgments of history.

**SIGNED at NAIROBI** this .....day of .....2016

**By:**

1. Ahmed Issack Hassan - Chairperson ) .....
2. Lilian Bokeeye Mahiri-Zaja - Vice Chairperson ) .....
3. Eng. Abdullahi Sharawe - Member ) .....
4. Thomas Letangule - Member ) .....
5. Mohamed Alawi Hussun - Member ) .....
6. Albert Camus Onyango Bwire - Member ) .....
7. Kule Galma Godana - Member ) .....
8. Amb. Yusuf A. Nzibo - Member ) .....
9. J. Muthoni Wangai - Member ) .....