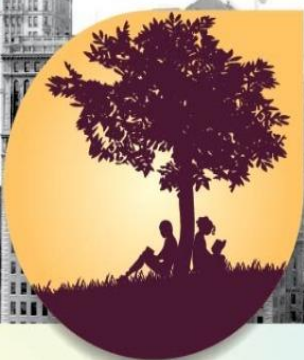


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## Electoral Dispute Resolution Mechanisms in Kenya

Prof. Tom Ojienda, SC\* and Lydia Mwalimu Adude\*\*

### Abstract

*Electoral dispute resolution mechanisms are at the core of every electoral system and process that aims to further democracy and the principle of free and fair elections. This paper focuses on the electoral dispute resolution mechanisms in Kenya and incorporates relevant changes made to the electoral laws in that regard. The paper first considers the legal framework and principles underlying the electoral system in Kenya. It then considers the various pre-election and post-election dispute resolution mechanisms provided for in our electoral laws.*

### 1 Introduction

Electoral dispute resolution (EDR) is the hallmark of any electoral system and process that is built to further *democracy and the principle of free and fair elections*. Electoral disputes can occur pre-election or post-election thus giving rise to the need for both pre-election EDR mechanisms and post-election EDR mechanisms. EDR mechanisms in Kenya are provided for under the Constitution of Kenya, 2010 (the Constitution), electoral statutes and regulations, and political party documents such as political party constitutions, nominations and primaries' rules, and coalition agreements; the electoral laws. EDR mechanisms are administrative and quasi-judicial, especially as pertains to intra-party pre-election disputes, as well as judicial, mostly as concerns post-election disputes.

Effective EDR mechanisms are *central in ensuring a peaceful and credible electoral process* and must, therefore, be able to deal with any form of challenge that may arise due to a disputed electoral process and outcome. As a consequence, it is imperative that the administrative, quasi-judicial, and judicial bodies mandated to hear and determine electoral disputes adjudicate the process in a free and fair manner pursuant to *article 50(1) of the*

Constitution.<sup>1</sup> In *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others*,<sup>2</sup> the Supreme Court was categorical that:

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*As a robust litigation counsel, Prof. Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Constitutional Law, Administrative Law, Land and Environment Law, Electoral Law, Employment Law, Commercial Law, Family Law, and other areas of law. He represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, In the Matter of the Speaker of the Senate & another [2013] eKLR - Speaker of the Senate & another v Attorney-General & 4 others (Advisory Opinion Reference No 2 of 2013); Independent Electoral and Boundaries Commission & 2 others v Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission [2015] eKLR - National Land Commission v Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR (Petition No 5 of 2014); Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR (Petition No 17 of 2018); Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested*

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Party) [2019] eKLR (Petition No 7 of 2018); *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR (Petition No 19 of 2015); *Moi v Rosanna Pluda* [2017] eKLR; *Town Council of Awendo v Nelson O. Onyango & 13 others*; *Abdul Malik Mohamed & 178 others (Interested Parties)* [2019] eKLR (Petition No 37 of 2014); *Wilfrida Arnodah Itolondo v Attorney General & 9 others* [2021] eKLR (Application No 3 of 2021 (E005 of 2021)); and *Speaker Nairobi City County Assembly & another v Attorney General & 3 others (Interested parties)* [2021] eKLR (Advisory Opinion Reference No 1 of 2020), among many others available at [www.proftomojiendaandassociates.com](http://www.proftomojiendaandassociates.com).

Prof. Ojienda, SC is an ardent scholar and has edited and published over 15 books and over 40 articles on diverse areas of the law. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodenyi), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa, 2012; "Anti-Corruption and Good Governance in East Africa" published by Law Africa, 2007; "Conveyancing Theory and Practice" published by Law Africa, 2002; and "Land Law and Conveyancing: Principles and Practice" published by Law Africa Publishing (K) Ltd, 2015, ISBN: 9789966031846 9966031847 (274 pages).

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- The authors acknowledge the research assistance of Deborah Amojong Osiya and Benjamin Brian Ng'ong'a in this research project. Both Deborah and Benjamin are part of the Legal Research and Policy Team at Prof. Tom Ojienda & Associates and have successfully completed their Postgraduate Diploma in Law (Advocates' Training Program) studies at the Kenya School of Law. Deborah holds a Bachelor of Laws (LL.B.) degree from the Catholic University of Eastern Africa (Nairobi, Kenya) while Benjamin holds a Bachelor of Laws (LL.B.) degree from Riara University Law School (Nairobi, Kenya).

One of the objectives of our Constitution is the establishment of firm institutions, that have a pivotal role in its implementation. Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations.’<sup>3</sup>

The administrative and quasi-judicial EDR mechanisms in Kenya are the political parties’ internal dispute resolution mechanisms (IDRM), the Independent Electoral and Boundaries Commission (IEBC) mechanisms (these are, the Dispute Resolution Committee, the Electoral Code of Conduct Enforcement Committee, and the Constituency Peace Committees), and the Political Parties Disputes Tribunal (PPDT).<sup>4</sup> Judicial EDR mechanisms means the elections courts which are vested with special electoral jurisdiction, that is, designated Resident Magistrates’ Courts, the High Court, the Court of Appeal, and the Supreme Court of Kenya when sitting as such.

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- *N.B.: An extract of this paper focusing on the management of team dynamics in election petitions, and having been specially adapted for a presentation to the Law Society of Kenya (LSK) during the LSK Colloquium on Electoral Laws and Practice held in Malindi on 9-10 December 2021, was published; Prof. Tom Ojienda, SC, ‘Electoral Dispute Resolution: Managing Team Dynamics in Election Petitions’ (2021) Journal of Conflict Management and Sustainable Management, Vol 7, Issue 4, ISBN: 978-9966-046-15-4, pp 1-28.*

<sup>1</sup> Article 50(1) of the Constitution guarantees the right to a fair hearing and provides that, ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.’

<sup>2</sup> [2016] eKLR, SCoK Pet No 1 of 2015.

<sup>3</sup> Para 121.

<sup>4</sup> On 25 April 2022, the Chief Justice announced that PPDT, which has solely been based in Nairobi since its inception, has been decentralized to other parts of the country for ease of access to electoral justice and to ensure cost-effective, convenient and timely resolution of pre-electoral disputes, that is, in law courts in Nairobi (Milimani Law Courts), Kisumu, Meru, Mombasa, Kakamega, Nyeri, and Eldoret. The Chief Justice also unveiled an e-filing system to aid with the online filing of cases at the PPDT.



This paper considers the entirety of EDR mechanisms in Kenya. The paper first considers the legal framework and principles that underlie the electoral system in Kenya and thereafter considers the pre-election and post-election dispute resolution mechanisms. Lastly, the paper looks into the parameters and tools for managing team dynamics in election petitions as pertains to the litigation of electoral disputes.

## **2. The Legal Framework and Principles that Underlie the Electoral System in Kenya**

This part of the paper will consider the legal framework and principles that inform Kenya's electoral system, and from which the various mechanisms for the resolution of electoral disputes are derived.

### **2.1 The Legal Framework on the Electoral System**

The legal framework on the electoral system in Kenya and the resolution of electoral disputes is drawn from the Constitution and the various electoral statutes and regulations made thereunder, which together form the bulk of Kenya's electoral laws.<sup>5</sup> We will consider each of these laws below.

#### **2.1.1. Constitution of Kenya, 2010**

*Chapter seven (articles 81-92) of the Constitution* is dedicated to the representation of the people. *Part 1 of chapter seven (articles 81-87) of the Constitution* entails specific provisions on the electoral system and process in Kenya. *Article 82(1)(b) and (d) of the Constitution* empowers Parliament to enact legislation to provide for the nomination of candidates, and the conduct, regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections.

The Independent Electoral and Boundaries Commission (IEBC) established under *article 88(1) of the Constitution* is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations,

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<sup>5</sup> Para 2 of the Electoral Code of Conduct, second schedule of the Elections Act, 2011 defines 'electoral laws' to mean '*the Constitution, the Elections Act and subsidiary legislation made thereunder as they relate to the presidential, parliamentary, county elections and the referendum.*'

but excluding election petitions and disputes subsequent to the declaration of election results.<sup>6</sup> IEBC is also responsible for the regulation of the process by which parties nominate candidates for elections; 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; the development of a code of conduct for candidates and parties contesting elections; and the monitoring of compliance with the legislation required by *article 82(1)(b) of the Constitution* relating to nomination of candidates by parties.<sup>7</sup> The Constitution requires all candidates and all political parties in every election to comply with the electoral code of conduct prescribed by IEBC.<sup>8</sup>

*Article 87 of the Constitution* is particular on electoral disputes and is coached towards *expeditious resolution of electoral disputes*. Parliament is required to enact legislation to establish mechanisms for timely settling of electoral disputes.<sup>9</sup> Election petitions, other than a presidential election petition, are to be filed within twenty-eight (28) days after the declaration of the election results by IEBC.<sup>10</sup> Service of an election petition may be direct or by advertisement in a newspaper with national circulation.<sup>11</sup> *Articles 140, 163(3)(a), and 165(5)(a) of the Constitution* on the other hand, give the Supreme Court exclusive original jurisdiction to hear and determine disputes relating to presidential elections, that is, elections to the office of President.<sup>12</sup>

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<sup>6</sup> Ibid art 88(4)(e).

<sup>7</sup> Ibid art 88(4)(d), (i), (j) and (k).

<sup>8</sup> Ibid art 84.

<sup>9</sup> Ibid art 87(1).

<sup>10</sup> Ibid art 87(2).

<sup>11</sup> Ibid art 87(3).

<sup>12</sup> See Constitution of Kenya, 2010, arts 136-140 (concern election of the president; qualifications and disqualifications for election as president; procedure at presidential election; procedure to be followed in case of death of a president-elect after being declared elected as president, but before assuming office; and questions as to validity of presidential election, respectively).

### **2.1.2 Independent Electoral and Boundaries Commission Act, 2011<sup>13</sup>**

The IEBC Act, 2011 implements the constitutional provisions that pertain to the role of IEBC in the electoral process and the delimitation of electoral boundaries in Kenya, including its role in the resolution of electoral disputes. *Section 4 of the Act* reiterates the functions of IEBC under *article 88(4) of the Constitution*.

### **2.1.3 Political Parties Act, 2011<sup>14</sup>**

First and foremost, *section 38I of the Political Parties Act, 2011* recognizes the role of a political party's internal dispute resolution mechanisms in the resolution of pre-election disputes. The section requires political parties to resolve any disputes arising from party nominations within thirty (30) days after the date of the party nominations. After exhausting a political party's internal dispute resolution mechanisms, an aggrieved party can seek recourse in the quasi-judicial EDR mechanisms.

*Part V (sections 39-44) of the Political Parties Act, 2011* establishes the *Political Parties Disputes Tribunal (PPDT)* and makes provision for its jurisdiction and workings.<sup>15</sup> *Section 40(1) of the Political Parties Act, 2011*, clothes PPDT with jurisdiction to hear and determine the following disputes:

- (a) disputes between the members of a political party;
- (b) disputes between a member of a political party and the political party;
- (c) disputes between political parties;
- (d) disputes between an independent candidate and a political party;
- (e) disputes between coalition partners;
- (f) appeals from decisions of the Registrar under the Political Parties Act, 2011; and

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<sup>13</sup> Act No 9 of 2011, Laws of Kenya (assented to on 5 July 2011 and obtained the force of law on the same day).

<sup>14</sup> Act No 11 of 2011, Laws of Kenya (assented to 27 August 2011 and obtained the force of law on 1 November 2011).

<sup>15</sup> Political Parties Act, 2011, s 39(1).

(fa) disputes arising out of party nominations.

By virtue of *section 40(2) of the Political Parties Act, 2011*, disputes between members of a political party, disputes between a member of a political party and the political party, disputes between political parties, disputes between coalition partners, and disputes arising out of party nominations must first be subjected to the internal political party dispute resolution mechanisms before one can approach PPDT.

In tandem with *article 87(1) of the Constitution, section 41(1) of the Political Parties Act, 2011* embraces the principle of expeditious resolution of electoral disputes and the Tribunal shall determine any dispute before it within *three (3) months* from the date the dispute is lodged. Appeals from decisions of the Tribunal lie in the High Court on both points of law and facts and a further final appeal lies in the Court of Appeal on points of law only.<sup>16</sup> A decision of the Tribunal is enforced in the same manner as a decision of a Magistrate's Court, however, the Tribunal is also clothed with similar powers as those of the High Court to punish for contempt.<sup>17</sup>

## **2.14 Elections Act, 2011<sup>18</sup>**

*Part VII (sections 74-87) of the Elections Act, 2011* specifically entails provisions on election disputes resolution. The Act makes provision for settlement of pre-election and post-election disputes. First, *section 74(1) of the Act* acknowledges the constitutional and statutory mandate of IEBC – under *article 88(4)(e) of the Constitution* and *section 4(e) of the IEBC Act, 2011* – to settle pre-election disputes, including disputes relating to or arising from nominations. IEBC has no mandate to settle election petitions and disputes subsequent to the declaration of election results. Electoral disputes brought before IEBC are to be determined within ten (10) days of being

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<sup>16</sup> Political Parties Act, 2011, s 41(2). Initially, appeals on points of law would proceed to the Supreme Court from the Court of Appeal, however, this changed with the enactment into law of the Political Parties (Amendment) Act, 2022 (Act No 2 of 2022, Laws of Kenya).

<sup>17</sup> Ibid s 41(3).

<sup>18</sup> Act No 24 of 2011, Laws of Kenya (assented to on 27 August 2011 and obtained the force of law on 2 December 2011).

lodged with the Commission.<sup>19</sup> However, where such a dispute relates to a prospective nomination or election, the dispute is to be determined before the date of the nomination or election as applicable.<sup>20</sup> The *IEBC Dispute Resolution Committee* has heard and determined a number of pre-election disputes arising in relation to *the 2013 and 2017 general elections*.<sup>21</sup>

As concerns post-election petitions, the Elections Act, 2011 entails procedures for settlement of disputes in relation to the various elective posts in respect of parliamentary and county elections. *Section 75 of the Elections Act, 2011* is particular on *county election petitions*. One, *a question as to the validity of an election of a county governor* is to be determined by *the High Court* within the county or nearest to the county.<sup>22</sup> The High Court is to hear and determine the matter within six (6) months of the date of lodging the petition.<sup>23</sup> Two, *a question as to the validity of the election of a member of a county assembly* is to be heard and determined by *the Resident Magistrate's Court* designated by the Chief Justice.<sup>24</sup> Thereafter, an appeal lies to the High Court on matters of law only, which appeal must be filed within thirty (30) days of the decision of the Magistrate's Court, and is to be heard and determined within six (6) months from the date of filing the appeal.<sup>25</sup> The reliefs that a court can grant in respect of county election petitions include: a declaration of whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; or an order as to whether a fresh election will be held or not.<sup>26</sup>

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<sup>19</sup> Elections Act, 2011, s 74(2).

<sup>20</sup> Ibid s 74(3).

<sup>21</sup> See Independent Electoral and Boundaries Commission (IEBC) and Electoral Institute for Sustainable Democracy in Africa (EISA-Kenya), 'Case Digest: Decisions of the IEBC Dispute Resolution Committee' <<https://www.eisa.org/pdf/eh2014ken.pdf>> (on the 2013 general elections).

<sup>22</sup> Elections Act, 2011, s 75(1).

<sup>23</sup> Ibid s 75(2).

<sup>24</sup> Ibid s 75(1A).

<sup>25</sup> Ibid s 75(4).

<sup>26</sup> Ibid s 75(3).

### **2.1.5 Election Campaign Financing Act, 2013<sup>27</sup>**

*Section 21 of the Election Campaign Financing Act, 2013* empowers IEBC to determine complaints regarding breaches of this Act. A person alleging a breach of the Act may lodge a complaint with IEBC, and IEBC may investigate breaches of the Act. Upon a complaint being filed or a breach under the Act being detected, IEBC is to hear and determine that complaint within seven (7) days, if filed before an election, or within fourteen days, if filed after an election.<sup>28</sup> Subject to its *section 4*, the Act clothes IEBC with court-like powers in determining a complaint including the power to request for the attendance of any person believed to have information related to the complaint, and to call for any information believed to be relevant in the determination of the complaint.<sup>29</sup>

If IEBC finds that there is a breach of any provision of the Election Campaign Financing Act, 2013, *section 21(5) of the Act* empowers IEBC to make any of the following orders:

- (a) order the rectification of any record;
- (b) issue a formal warning;
- (c) impose a fine as may be specified under the regulations;
- (d) prohibit the errant candidate, political party or referendum committee from campaigning for a specified period or within a specified area;
- (e) prohibit media coverage of the errant candidate, political party or referendum committee within a specified period; or
- (f) disqualify the errant candidate, political party or referendum committee from contesting in that election or referendum, as the case may be.

If an offence is discovered after an election and an order of disqualification is made, the candidate or the political party will be disqualified from

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<sup>27</sup> Act No 42 of 2013, Laws of Kenya.

<sup>28</sup> Election Campaign Financing Act, 2013, s 21(3).

<sup>29</sup> *Ibid* s 21(4).

contesting in the subsequent by-election or general election.<sup>30</sup> An order of disqualification so made is to be registered in the High Court, in the case of presidential, parliamentary, governor elections or referendum, and is registered in the resident magistrate's court in the case of county assembly elections.<sup>31</sup>

In addition to the Constitution and the above statutes, also consider the *Election Offences Act, 2016*,<sup>32</sup> the *Election Laws (Amendment) Act, 2016*,<sup>33</sup> and the *Election Laws (Amendment) Act, 2017*.<sup>34</sup>

## **2.2 The Principles of the Electoral System**

*Political rights* are enshrined under *article 38 of the Constitution*. Every citizen is free to make political choices, which include the right to form, or participate in forming, a political party and to participate in the activities of, or recruit members for, a political party.<sup>35</sup> Further, every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution; or any office of any political party of which the citizen is a member.<sup>36</sup> Furthermore, every adult citizen has the right, without unreasonable restrictions, to be registered as a voter, to vote by secret ballot in any election, and to be a candidate for election to public office, or office within a political party of which the citizen is a member and, to hold office if elected.<sup>37</sup>

*Article 81 of the Constitution* also provides for *the general principles for the electoral system*, which guide the election process. The principles that

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<sup>30</sup> *Ibid* s 21(6).

<sup>31</sup> *Ibid* s 21(7).

<sup>32</sup> Act No 37 of 2016, Laws of Kenya (assented to on 13 September 2016 and came into operation on 4 October 2016).

<sup>33</sup> Act No 36 of 2016, Laws of Kenya (assented to on 13 September 2016 and came into operation on 4 October 2016).

<sup>34</sup> Act No 34 of 2017, Laws of Kenya (assented to on 28 October 2017 and came into force upon publication in the *Gazette*).

<sup>35</sup> Constitution of Kenya 2010, art 38(1).

<sup>36</sup> *Ibid*, art 38(2).

<sup>37</sup> *Ibid* art 38(3).

underlie Kenya's electoral system include: freedom of citizens to exercise their political rights under *article 38 of the Constitution*;<sup>38</sup> free and fair elections by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent, and administered in an impartial, neutral, efficient, accurate and accountable manner;<sup>39</sup> and universal suffrage based on the aspiration for fair representation and equality of vote.<sup>40</sup> The electoral system in Kenya must also comply with the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender, and the principle of fair representation of persons with disabilities.<sup>41</sup>

Moreover, the *basic requirements for political parties* under *article 91 of the Constitution* require every political party to *inter alia* have a democratically elected governing body; abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party; respect the right of all persons to participate in the political process; respect and promote human rights and fundamental freedoms; and subscribe to and observe the code of conduct for political parties. In addition, a political party is prohibited from *inter alia* engaging in or encouraging violence by, or intimidation of, its members, supporters, opponents or any other person.<sup>42</sup>

It then follows that there is a defined, free and fair electoral justice system to deal with any electoral or political disputes as and when they arise at every stage of the electoral process, by reference to the EDR mechanisms put in place under our legal framework on elections. We will now consider the EDR mechanisms for resolving the two categories of election disputes, pre-election disputes and post-election disputes.

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<sup>38</sup> Ibid art 81(a).

<sup>39</sup> Ibid art 81(e).

<sup>40</sup> Ibid, art 81(d)

<sup>41</sup> Ibid art 81(b) and (c).

<sup>42</sup> Ibid art 91(2)(b).



### **3. Pre-election Dispute Resolution Mechanisms**

As indicated earlier, electoral disputes arise at all stages of the electoral process, before and after the election exercise itself. As a result, administrative, quasi-judicial, and judicial EDR mechanisms have been put in place to address the challenges and disputes arising in the course of the electoral process. For a long time, the judicial system in its untweaked state (to cater to the specific and timely demands of electoral justice) was considered to be the only avenue for resolving electoral disputes. In essence, candidates who felt aggrieved not only with the actual electoral outcomes but also party primaries and nominations would only seek redress in courts, through ‘election petitions.’ However, the process proved messy and overwhelming to the judicial system as candidates flocked the courts with many cases disputing both the political party nominations and the elections.

The 2010 Constitutional dispensation relieved the judicial system from the shock of being overwhelmed with electoral disputes by giving aggrieved parties alternative avenues to settle electoral disputes, especially pre-election disputes. As a result, courts only handle appeals arising in respect of pre-election disputes and have special jurisdiction as election courts to handle election petitions which only occur after the election exercise. The legal framework and mechanisms for intra-party and pre-election dispute resolution in Kenya is thus grounded on the Constitution of Kenya, 2010 and the implementing electoral statutes, that is, the Elections Act, 2011, the Political Parties Act, 2011, the IEBC Act, 2011, the Election Campaign Financing Act, 2013, and the Election Offences Act, 2016.

#### **3.1 Pre-election Disputes**

Pre-election disputes include disputes within and between political parties; electoral offences and illegal practices; voter registration disputes; disputes arising from the nomination of candidates; and disputes relating to violation(s) of the Electoral Conduct Code of Conduct.<sup>43</sup>

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<sup>43</sup> See the Judiciary Working Committee on Election Preparations, ‘Pre-election Dispute Management: Between Judicial And Administrative Dispute Management Mechanisms’ (Kenya Law Blog; 17 September 2012) <<http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>>.

### **3.1.3 Disputes Within and Between Political Parties**

Disputes within political parties concern disputes between members of a political party, disputes between a political party and a member(s) of the political party, and disputes between a political party and an independent candidate. Disputes within political parties often arise in relation to the registration of members, nominations and primaries, and the listing of the names of candidates nominated to vie for elective posts under the party's ticket. In ensuring that such disputes are settled in a fair manner, *article 47 of the Constitution* provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. On the other hand, disputes between political parties refer to any dispute between one or more political parties or disputes between coalition partners and these are often resolved through mechanisms external to any one political party or in accordance with a coalition agreement as applicable.

As already indicated, **Part V of the Political Parties Act, 2011** establishes the Political Parties Disputes Tribunal (PPDT) and gives it jurisdiction to determine various kinds of disputes. These include; disputes between the members of a political party, between a member of a political party and a political party, between political parties, between independent candidates and a political party, disputes arising out of party primaries among others.<sup>44</sup>

Furthermore, the **Political Parties Disputes Tribunal (Procedure) Regulations, 2017** provides for the procedure for the determination of disputes before the Tribunal as well as a timeline whereby a complaint against the decision by a political party ought to be lodged, within fourteen (14) days from the date of the decision.<sup>45</sup> In *Gabriel Bukachi Chapia v ODM & Another*,<sup>46</sup> the Court of Appeal held that:

In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a

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<sup>44</sup> Political Parties Act, 2011, s 40(1).

<sup>45</sup> Political Parties Disputes Tribunal (Procedure) Regulations, 2017, reg 7 and 8.

<sup>46</sup> [2017] eKLR, CoA (Nairobi), Civil Appeal No 168 of 2017 (Nambuye, Musinga & Gatembu, JJA).

political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.<sup>47</sup>

### **3.1.4 Disputes Relating to Voter Registration**

**Article 83(1) of the Constitution** gives the minimum requirements for a person to be registered as a voter in Kenya; must be an adult citizen, is not declared to be of unsound mind, and has not been convicted of an election offence during the preceding five years. Although the article is categorical that one can only be registered as a voter at only one registration centre,<sup>48</sup> it goes on to specifically provide that any administrative arrangements for the registration of voters and the conduct of elections must be designed to facilitate and not deny an eligible voter the right to vote or stand for election.<sup>49</sup>

**Section 11 of the Elections Act, 2011** provides that any dispute as to whether a person is qualified to be registered as a voter is to be determined in accordance with **Part II of the Act (sections 3-12)**.<sup>50</sup> Disputes under Part II of the Act also relate to the maintenance of the register of voters, registration of voters, disqualification of a person from registration as a voter, inspection of the register of voters by members of the public, rectification of a voter's details in the register, the transfer of registration to an electoral area other than the one the voter is registered in, and claims where a person has duly applied to be registered as a voter but their name is not reflected in the register of voters.<sup>51</sup>

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<sup>47</sup> Ibid para 28.

<sup>48</sup> Constitution of Kenya, 2010, art 83(2)

<sup>49</sup> Ibid art 83(3).

<sup>50</sup> Elections Act, 2011, s 11.

<sup>51</sup> Ibid ss 4-9, and 12,

In *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others*,<sup>52</sup> the Supreme Court stressed the significance of voter registration when the court opined that:

It is our perception that, the issue of a Voters' Register when raised in any election proceedings, is a primary issue for determination. Registration of voters is also a constitutional imperative, by Article 83 of the Constitution which outlines the prerequisites of voter registration. (...) Registration facilitates the effectuation of the right to vote. **Article 38(3)(a)** decrees that every adult citizen has a right, without unreasonable restrictions, to be registered as a voter. As such, the right to vote cannot be fully enjoyed if the registration of voters is not properly conducted.<sup>53</sup>

### **3.1.5 Disputes Arising from Nomination of Candidates**

Nomination means the submission to IEBC of the name of a candidate in accordance with the Constitution and the **Elections Act, 2011**.<sup>54</sup> **Articles 99, 137, and 180 of the Constitution** are relevant as concerns the qualifications for a person to be nominated by a political party as a candidate for Parliamentary elections, Presidential elections, gubernatorial elections, respectively. **Part IVA (sections 38A-38I) of the Political Parties Act, 2011** entails provisions pertaining to the conduct of party nominations and the internal resolution of party nominations disputes.

**Section 13 of the Elections Act, 2011** provides for the process for nomination of candidates for elections by a political party. A political party is required to nominate its candidates for an election at least ninety (90) days before a general election and it cannot change the name of a nominated candidate after the nomination of that person has been received by IEBC. Prior to submitting the nomination papers to IEBC, as applicable, a political

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<sup>52</sup> [2017] eKLR, SCoK, Pet Nos 2 & 4 of 2017 (consolidated) (11 December 2017, Maraga, CJ & P, Mwilu, DCJ & V-P, Ojwang, Wanjala, Njoki Ndung'u and Lenaola, SCJJ).

<sup>53</sup> Ibid paras 354 and 355.

<sup>54</sup> Elections Act, 2011, s 2.

party can only change the name of a nominated candidate on account of death, resignation or incapacity of the nominated candidate or on account of the nominated candidate having violated the Electoral Code of Conduct, but subject to prior notice being given to the affected candidate. Further provisions regarding nominations and the qualifications and disqualifications of candidates for nominations for presidential, parliamentary and county elections are contained in **sections 22 to 26 and 31 of the Elections Act, 2011**. As such, it is commonplace for disputes to arise as a result of party nominations, hence the necessity for just, convenient, affordable and expeditious EDR mechanisms to cater to such disputes.

It is worth noting that the Constitution stipulates that every political party shall abide by the democratic principles of good governance, and promote and practice democracy through regular, fair and free elections within the party.<sup>55</sup> Disputes regarding the fairness of party nominations of candidates have far reaching effect in that the consequence of not adhering to what the Constitution demands can lead to the deregistration of a political party.<sup>56</sup> Regarding the settling of nominations disputes, it was stated in the case of *Hafidmaalim Ibrahim & another v Economic Freedom Party & 3 other*,<sup>57</sup> which concerned the nominated members for the County Assembly of Mandera County under **article 90 of the Constitution**, that:

Any dispute relating to or arising from these nominations ought to have been settled by the Commission before the date of the nominations as provided by the law. It is therefore the IEBC who had jurisdiction to settle the petitioners' dispute. There is no evidence that they lodged their disputes with the legally mandated body before coming to this court. The petitioners have not given any reasons why they did not and I cannot find any other reason but to assume that they are forum shopping. Having failed to lodge [their] dispute with the Commission before the date of the

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<sup>55</sup> Constitution of Kenya, 2010, art 91(1)(d)

<sup>56</sup> Political Parties Act, 2011, s 21(1)(b).

<sup>57</sup> [2018] eKLR, SRM (Mandera), Election Pet Nos 2 & 5 (consolidated).

nominations as is required by law I find their petitions herein are not properly before this court and are otherwise an abuse of the process of court.

It is worth noting that on the one hand there are party nominations conducted by political parties for candidates to be elected by voters on the party's ticket (election by voters). On the other hand, political parties also conduct nominations of persons into public office through political party lists submitted to IEBC under **article 90 of the Constitution** (election by nomination).<sup>58</sup> IEBC has jurisdiction to hear such nominations disputes prior to the nominations exercise itself.<sup>59</sup>

In the case of political party lists under **article 90 of the Constitution, section 36(4) of the Elections Act, 2011** stipulates that, '*Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.*' Pursuant to **section 35A of the Elections Act, 2011** before submitting the party lists to the Commission, the Registrar of Political Parties must certify that the names appearing in those party lists belong to registered members of the subject political party. **Any dispute in respect of certification of party lists is to be addressed by PPDT.**<sup>60</sup> However, subsequent to the submission of the party lists to IEBC and following the declaration of the results of the election, any dispute thereby arising to challenge the validity of the party lists or the nomination itself will be addressed by the courts by way of an election petition.<sup>61</sup>

### 3.1.6 Electoral Offences and Illegal Practices

Political mischief perpetrated by political parties, their officials and IEBC to unfairly favour one candidate over the others may also lead to disputes by the aggrieved candidates. Electoral offences and illegal practices may thus be perpetrated by the said political parties, their officials and IEBC staff.

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<sup>58</sup> Elections Act, 2011, ss 34-37.

<sup>59</sup> Ibid s 74.

<sup>60</sup> Ibid s 35A(3).

<sup>61</sup> Ibid s 74(1).

Some offences that may be committed in such cases relate to the register of voters, multiple registrations as a voter, voting, offences by members and staff of IEBC, voter impersonation, bribery, undue influence, and use of violence, among others.<sup>62</sup>

In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)*,<sup>63</sup> the Supreme Court noted the perpetration of election offences by IEBC officers in failing to sign the election results declaration forms and the court held that:

Among the irregularities found was the failure to sign the result declaration Forms 37A in several polling stations. I concur with the trial Court that the candidates' or their respective agents' failure to sign those forms is excusable under Regulation 79 of the Regulations, but that of the presiding or deputy presiding officer is not. The failure by the presiding or the deputy presiding officer to sign the result declaration form is not only a criminal offence under section 6 (j) of the Election Offences Act, but it also renders such Forms worthless.<sup>64</sup>

**3.1.7 Disputes Relating to Breaches of the Electoral Code of Conduct Article 84 of the Constitution and section 110 of the Elections Act, 2011** require that in every election, all candidates and political parties must subscribe to and comply with the code of conduct prescribed by IEBC. The Electoral Code of Conduct is set out in the **Second Schedule of the Elections Act, 2011** and it entails the promotion of gender equality, ethnic tolerance, cultural diversity, and fair representation of special interest groups, and the prevention of violence and intimidation, among others. Any party who feels that the Electoral Code of Conduct has been breached may lodge a complaint with IEBC, that is, the Electoral Code of Conduct Enforcement Committee (ECCEC) and IEBC is empowered to handle such

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<sup>62</sup> Election Offences Act, 2016 (Act No 37 of 2016).

<sup>63</sup> [2019] eKLR, SCOK, Pet No 7 of 2018, (Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).

<sup>64</sup> Ibid para 188.

complaints and impose penalties and even institute proceedings in the High Court for breaches of the Code as appropriate.<sup>65</sup>

## 3.2 Pre-election Dispute Resolution Mechanisms

### 3.2.3 The Independent Electoral and Boundaries Commission (IEBC)

IEBC is established under **article 88(1) of the Constitution**. The Commission is constitutionally mandated to conduct or supervise referenda and elections to any elective body or office and any other elections as prescribed by an Act of Parliament.<sup>66</sup> IEBC is also mandated with regulating the process of nomination of candidates for elections by political parties, as well as monitoring compliance with the legislation relating to nomination of candidates.<sup>67</sup>

One of the main functions of IEBC as provided in **article 88(4)(e) of the Constitution** and **section 4(e) of the IEBC Act, 2011** is the settlement of electoral disputes, including disputes relating to or arising from nominations.<sup>68</sup> IEBC has no mandate to settle election petitions and disputes subsequent to the declaration of election results.<sup>69</sup> Disputes submitted to IEBC are to be determined within ten (10) days of the lodging of the dispute with IEBC.<sup>70</sup> However, disputes relating to a prospective nomination or election shall be determined before the date of the nomination or election, as applicable.<sup>71</sup> As noted earlier, the **IEBC Dispute Resolution Committee** has heard and determined a number of pre-election disputes in relation to the 2013 and 2017 general elections in Kenya.

In addition, IEBC is responsible for the enforcement of the **Electoral Code of Conduct** set out in the **second schedule of the Elections Act, 2011**.<sup>72</sup> The

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<sup>65</sup> See Electoral Code of Conduct, paras 7-12 and 19.

<sup>66</sup> Constitution of Kenya, 2010, art 88(4).

<sup>67</sup> Ibid art 88(4)(d) and (k).

<sup>68</sup> Elections Act, 2011, s 74(1).

<sup>69</sup> Ibid.

<sup>70</sup> Ibid s 74(2).

<sup>71</sup> Ibid s 74(3).

<sup>72</sup> Ibid ss 51(6) and 110(1).



Electoral Code of Conduct is intended to promote conditions conducive to the conduct of free and fair elections and a climate of political tolerance which allows for political activities to take place without fear, coercion, intimidation or reprisals.<sup>73</sup> In respect to elections, the Code binds the Government, every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.<sup>74</sup> The Electoral Code of Conduct applies in the case of a general election, from the date of publication of a notice of election until the swearing in of newly elected candidates, and in the case of a by-election, from the date of declaration of a vacancy until the swearing in of elected candidates.<sup>75</sup>

Any person may complain to IEBC about the breach of the Electoral Code of Conduct.<sup>76</sup> IEBC is mandated to set up two entities with a role in the enforcement of the Electoral Code of Conduct; the **Electoral Code of Conduct Enforcement Committee (ECCEC)**,<sup>77</sup> and the **Constituency Peace Committees**.<sup>78,79</sup> ECCEC, which must comprise of not less than five members of IEBC, is chaired by a member appointed by the IEBC Chairperson. The Committee receives complaints alleging infringement of the Electoral Code of Conduct.<sup>80</sup> The Committee then issues summons to persons and political parties complained against to attend its meetings in a bid to address the said complaint.<sup>81</sup> The Committee is not bound by the provisions of the Criminal Procedure Code (Cap 75) or the Evidence Act (Cap 80) in its proceedings, but every person who is summoned and attends

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<sup>73</sup> See paras 3, 5 and 6 of the Electoral Code of Conduct, second schedule of the Elections Act, 2011.

<sup>74</sup> Ibid para 1.

<sup>75</sup> Ibid para 18.

<sup>76</sup> Ibid para 19.

<sup>77</sup> Ibid para 15.

<sup>78</sup> Ibid para 17.

<sup>79</sup> See the Judiciary Working Committee on Election Preparations, 'Pre-election Dispute Management: Between Judicial And Administrative Dispute Management Mechanisms' (Kenya Law Blog; 17 September 2012) <<http://kenyalaw.org/kenyalawblog/pre-election-dispute-management-between-judicial-and-administrative-dispute-management-mechanisms/>>.

<sup>80</sup> Electoral Code of Conduct, para 15.

<sup>81</sup> Ibid para 15(4).

the meetings of ECCEC has a right to be heard. The Committee is required to deliver its verdict expeditiously - which includes punishing the person found to have infringed the Code - and to inform the parties of its decision. ECCEC also examines and determines complaints not resolved satisfactorily by the Constituency Peace Committees. The Constituency Peace Committees are mandated to investigate issues and allegations of election malpractice arising during the election period, reconcile warring parties, mediate political disputes in the constituencies, liaise with the government security agencies in the constituency and report suspected election malpractices, and report any violation of the Electoral Code of Conduct to ECCEC for appropriate action.<sup>82</sup>

Where in the opinion of ECCEC there has been an infringement of the Electoral Code of Conduct by any political party, the leader, office bearer, or member of a political party or a person who supports a political party, or any candidate, IEBC as part of its functions may issue a formal warning, a fine determined by it, an order prohibiting the political party from utilizing public media, permanently or for a specified period, or from erecting placards or banners or publishing and distributing campaign literature, among other sanctions.<sup>83</sup>

### **3.2.4 Political Parties Disputes Tribunal (PPDT)**

PPDT is established under the Political Parties Act, 2011 and its members are appointed by the Judicial Service Commission (JSC).<sup>84</sup> As mentioned earlier, the jurisdiction of the Tribunal is provided under **section 40 of the Political Parties Act, 2011**, which includes the mandate to resolve disputes between the members of a political party; disputes between a member of a political party and the political party; disputes between political parties; disputes between an independent candidate and a political party; disputes between coalition partners; appeals from the decision(s) of the Registrar under the Political Parties Act; and disputes arising out of party

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<sup>82</sup> Ibid para 17(3).

<sup>83</sup> Ibid para 7.

<sup>84</sup> Political Parties Act, 2011, s 39.

nominations.<sup>85</sup> Furthermore, other than disputes between an independent candidate and a political party and appeals from the decisions of the Registrar under the Political Parties Act, the Act stipulates that parties must have exhausted the internal political party dispute resolution mechanisms as a prerequisite to activating the jurisdiction of PPDT.<sup>86</sup>

Disputes being heard by the Tribunal must be determined expeditiously and no later than three (3) months from the date the dispute is lodged by the complainant.<sup>87</sup> As a quasi-judicial mechanism, PPDT applies the rules of evidence and procedure under the Evidence Act (Cap 80) and the Civil Procedure Act (Cap 21) with necessary modifications, but without paying undue regard to procedural technicalities.<sup>88</sup> Decisions of PPDT are enforced in the same manner as a decision of a Magistrate's Court.<sup>89</sup> It is worth noting that the Tribunal's decision is not final and therefore, parties feeling aggrieved can appeal the said decision at the High Court on points of law and facts. A further final appeal on points of law only lies at the Court of Appeal.<sup>90</sup>

On the issue of what would happen if a party failed to activate the existing internal political party dispute resolution mechanisms, in a ruling delivered on 14 December 2011 in the case of *Stephen Asura Ochieng & 2 others v Orange Democratic Movement Party & 2 others*,<sup>91</sup> Mumbi Ngugi J expressed herself in the manner that:

The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties [Disputes] Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but

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<sup>85</sup> Ibid s 40(1).

<sup>86</sup> Ibid s 40 (2).

<sup>87</sup> Ibid s 41 (1).

<sup>88</sup> Ibid s 41 (4).

<sup>89</sup> Ibid s 41 (3).

<sup>90</sup> Ibid s 41 (2).

<sup>91</sup> [2011] eKLR, HC (Nairobi), Pet No 288 of 2011.

to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. [12] **To my mind, the intention behind the establishment of the Political Parties [Disputes] Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. [13] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute.**<sup>92</sup>

It is important to note that there have been diverging court interpretations pertaining to activating the jurisdiction of the Tribunal *vis-à-vis* a political party's internal dispute resolution mechanisms. In a judgment delivered on

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<sup>92</sup>Ibid para 11-13. See also *Republic v Jubilee Party & another Ex parte Wanjiku Muhia & another* [2017] eKLR, HC (Nairobi), Misc Civil Appli No 308 of 2017, para 41.

15 May 2017 in the case of *Eric Kyalo Mutua v Wiper Democratic Movement, Kenya & another*,<sup>93</sup> Onguto J addressed the issue by placing reliance on the **doctrine of appropriateness** as follows:

Evidently, in so much as the relatively less adversarial intra party dispute resolution is encouraged, the statute also expressly grants powers to the PPDT to directly handle disputes having their origins in party nominations. There is concurrent jurisdiction and a party may either land before the PPDT or the party's internal dispute resolution mechanism. It consequently, entails a balancing act between the two statutes and the PPDT must be in a position to invoke the doctrine of appropriateness long enshrined in the cases of *Sim v Robinow [1892]19 L R 665* and *The Spiliada [1987] AC 460*. See also the case of *Patrick Musimba v National Land Commission & 4 Others (No 1) [2016] eKLR* where both *Sim v Robinow (supra)* and *The Spiliada (supra)* were cited with approval and followed. Where appropriate consequently the PPDT should entertain the dispute or alternatively determine that the better forum would be the political party's internal dispute resolution mechanism and refer the dispute to the relevant party organ. The PPDT may however not decline jurisdiction or dismiss a complaint simply because a dispute is yet to be filed before the party's dispute resolution organ. The instances may be various but to my mind, I can immediately identify a situation where time is evidently headed beyond a party's grasp. I may also cite a situation where the political party is evidently bent on frustrating a member. Likewise, there may be an instant where the dispute involves a non-member with a member but off a party primary process. The legislature must have had such instances in mind.<sup>94</sup>

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<sup>93</sup> HC (Nairobi), Constitutional & Human Rights Div, Election Pet Appeal No 4 of 2017.

<sup>94</sup> Ibid paras 48-50.

On the other hand, in a judgment delivered on 22 May 2017 in the case of *Rachael Nyamai v Jubilee Party of Kenya & another*,<sup>95</sup> Muchelule J, while citing **section 40 of the Political Parties Act, 2011**, was categorical that:

It follows that the Tribunal shall only hear an appeal between a political party and its member where the member's grievance or complaint has first been heard and determined by the party's internal dispute resolution mechanism. Where the Constitution or statute has established a dispute resolution mechanism, that mechanism has to be used and exhausted.<sup>96</sup>

In addition, in a judgment delivered on 2 June 2017 in the case of *David M Mbuthi v Jubilee Party & another*,<sup>97</sup> PPDT held that:

For instance, it is our interpretation of the law that a party primary dispute can be characterized as a dispute between a member of a political party and a political party or as a dispute of between members of a political party. Meaning, despite being a distinct dispute according to the Act, a party primary dispute ordinarily ought to be referred first to a political party's internal dispute resolution mechanism. To augment this view, we seek recourse from section 13(2A) of the Elections Act, which gives political parties thirty days within which to resolve such disputes. This Tribunal is persuaded to take the view that it is not in vain that the law requires a party primary dispute to be resolved internally by a political party's dispute resolution mechanism.<sup>98</sup>

### **3.2.5 Is there Concurrent Jurisdiction between IEBC and PPDT?**

As stated earlier, the jurisdiction of PPDT is provided for in **section 40 of the Political Parties Act, 2011**. PPDT is empowered to hear and determine

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<sup>95</sup> HC (Milimani, Nairobi), Election Pet Appeal No 58 of 2017.

<sup>96</sup> Ibid para 5.

<sup>97</sup> [2017] eKLR, PPDT (Nairobi), Complaint No 305 of 2017 (Hon Mbobu, Atema and Abdi).

<sup>98</sup> Ibid paras 12 and 13.

pre-election disputes, among them being disputes arising out of party nominations; **section 40(1)(fa) of the Political Parties Act, 2011**.<sup>99</sup> On the other hand, IEBC is mandated under **article 88(4)(e), section 4(e) of the IEBC Act, 2011** and **section 74(1) of the Elections Act, 2011** to settle of pre-election disputes, including disputes relating to or arising from nominations, excluding election petitions and post-election disputes. Consequently, both PPDT and IEBC have jurisdiction in the resolution of nomination disputes; **‘disputes arising out of party nominations’** and **‘disputes relating to or arising from nominations’**, respectively. **Section 2 of the Elections Act, 2011** defines *‘nomination’* as *‘the submission of the name of a candidate to IEBC in accordance with the Constitution and [the Elections] Act.’*

Nonetheless, it is important to note that, **section 27(a)(ii) of the Political Parties (Amendment) Act, 2022** did amend **section 40(1)(fa) of the Political Parties Act, 2011** by substituting the phrase *‘party primaries’* with *‘party nominations’*. **Section 2(b) of the amendment Act** also deleted the phrase *‘party primary’* from the definition section under **section 2 of the Political Parties Act, 2011**. This change (move from *‘party primaries’* to *‘party nominations’* under **section 40(1)(fa) of the Political Parties Act, 2011**) may have some interesting effects on the delimitation of roles between PPDT and IEBC as far as the resolution of nomination disputes are concerned.

As an aside though, **regulation 2 of the Elections (General) Regulations, 2012** defines *‘party primary’* as *‘the process through which a political party elects or selects a candidate for an election but does not include a party list.’*<sup>100</sup> In that case, disputes arising from party primaries excluded disputes arising out of the allocation of party list seats under **article 90 of the Constitution**, which are under the IEBC’s mandate by virtue of **article 90(2) of the Constitution**. The allocation of party list seats under **article 90 of the Constitution** aims for proportional representation through the use of party lists submitted to IEBC in respect of the nominative posts under **articles**

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<sup>99</sup> See Political Parties (Amendment) Act, 2022, s 27(a)(ii).

<sup>100</sup> Elections (General) Regulations, 2012.

**97(1)(c)**<sup>101</sup> and **98(1)(b), (c) and (d) of the Constitution**<sup>102</sup> for Members of Parliament, and under **article 177(1)(b) and (c) of the Constitution** for Members of County Assemblies.

On 28 May 2017, **PPDT and IEBC signed a Memorandum of Understanding (MoU) on responsibilities in the resolution of pre-election disputes arising from party primaries and nominations** to delimit the roles of the two EDR mechanisms in the resolution of pre-election disputes. Moreover, the Court of Appeal had occasion to comment on **section 40(1)(fa) of the Political Parties Act, 2011** (which at the time gave PPDT jurisdiction over disputes arising out of ‘*party primaries*’) in the case of *Joseph Ibrahim Musyoki v Wiper Democratic Movement-Kenya & another*.<sup>103</sup> The Court of Appeal stated:

It is significant to note that **Section 40 [1](fa) [of the Political Parties Act, 2011]** was an amendment made by Act No. 21 of 2016 [Political Parties (Amendment) (No.2) Act, 2016] on 21st July 2016 with the object of addressing the challenge of concurrent jurisdiction with other bodies handling electoral disputes. The two institutions therefore have their roles clearly and distinctively cut out. Indeed, this was acknowledged by the PPDT and the High Court.<sup>104</sup>

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<sup>101</sup> Concerns the twelve (12) Members of the National Assembly nominated by parliamentary political parties according to their proportion of elected Members of the National Assembly, to represent special interests including the youth, persons with disabilities and workers.

<sup>102</sup> Concerns the sixteen (16) women Members of the Senate nominated by political parties according to their proportion of the forty-seven (47) elected Members of the Senate; two (2) members, being one (1) man and one (1) woman, representing the youth; and two (2) members, being one (1) man and one (1) woman, representing persons with disabilities.

<sup>103</sup> [2017] eKLR, CoA (Nairobi), Civil Appeal No 203 of 2017 (Waki, Musinga & Ouko, JJA).

<sup>104</sup> Ibid para 20.



In the said case, the Court of Appeal found that since the issue therein had transited from 'party primary' to 'nomination' then PPDT no longer had jurisdiction as the matter now fell on the IEBC's jurisdiction:

The sum total of the pleadings and affidavit evidence lead us to the inescapable conclusion that as at the 6th June 2017, and certainly before the PPDT determined the complaint laid before it by Musyoki, the name of Maundu had been submitted to IEBC as the nominee of Wiper. It follows that the process had transited from party primary to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC.<sup>105</sup>

In view of the amendment made to **section 40(1)(fa) of the Political Parties Act, 2011** by **section 27(a)(ii) of the Political Parties (Amendment) Act, 2022**, it will be interesting to see if the said amendment complicates the roles of PPDT and IEBC in the resolution of nomination disputes.

### **3.2.6 The Jurisdiction of Courts over Pre-Election Disputes**

Courts have inherent jurisdiction to hear and determine pre-election disputes, as well as jurisdiction granted by the Constitution and legislation. The jurisdiction of courts to hear pre-election disputes can be invoked in civil, criminal and judicial review proceedings. The High Court possesses inherent jurisdiction to hear and determine pre-election disputes by dint of **article 165(3)(a) of the Constitution** that confers unlimited original jurisdiction in criminal and civil matters to that Court. More particularly, such pre-election disputes can be framed as a denial, violation or infringement of political rights possessed by every citizen under **article 38 of the Constitution**. In that case, **articles 23(1) and 165(3)(b) of the Constitution** provide the High Court with jurisdiction to determine a question as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further, **article 22(1) of the Constitution** grants every person the right to institute court proceedings claiming that such rights have been denied, violated, infringed, or threatened.

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<sup>105</sup> Ibid para 29.

**Sections 6 and 7 of the Magistrates' Courts Act, 2015**<sup>106</sup> embody the civil and criminal jurisdiction of the magistrates' courts.<sup>107</sup> In addition, **article 23(2) of the Constitution**, empowers Parliament to enact legislation to devolve the High Court's original jurisdiction under **article 23(1) of the Constitution** to the Magistrates' Courts. Subject to **article 165(3)(b) of the Constitution**, **section 8 of the Magistrates' Courts Act, 2015** grants magistrates' courts jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights within the parameters of their pecuniary jurisdiction under **section 7(1) of the Magistrates' Courts Act, 2015**.

In such proceedings instituted under **article 23(1) and (2) of the Constitution**, courts have wide discretion to grant appropriate relief by virtue by **article 23(3) of the Constitution**. Reliefs that can be granted by the courts include a declaration of rights; an injunction; a conservatory order; a declaration as to the invalidity of any law that denies, violates, infringes, or threatens rights and fundamental freedoms in the Bill of Rights, in this case political rights under **article 38 of the Constitution**; an order for compensation; and or judicial review orders of certiorari, mandamus or prohibition. Further, **article 258 of the Constitution**, which is coined in similar terms as **article 23 of the Constitution**, allows any person to institute court proceedings regarding contraventions of or threatened contraventions of the Constitution, in this case as pertains to the provisions in chapter seven through to chapter eleven of the Constitution on constitutional issues

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<sup>106</sup> Act No 26 of 2015, Laws of Kenya.

<sup>107</sup> The criminal jurisdiction of magistrates' courts is drawn from the Criminal Procedure Code (Cap 75) and any other written law which defines offences and prescribes the applicable penalties, including electoral statutes which provide for election offences. On the other hand, the civil jurisdiction of magistrates' courts is capped under section 7(1) of the Magistrates' Court Act, 2015 as follows: (a) twenty (20) million shillings, where the court is presided over by a chief magistrate (CM); (b) fifteen (15) million shillings, where the court is presided over by a senior principal magistrate (SPM); (c) ten (10) million shillings, where the court is presided over by a principal magistrate (PM); (d) seven (7) million shillings, where the court is presided over by a senior resident magistrate (SRM); or (e) five (5) million shillings, where the court is presided over by a resident magistrate (RM).

regarding the representation of the people and presidential, parliamentary, and county elections.

However, approaching the courts to resolve electoral disputes should be a matter of last resort. The settlement of pre-election disputes is predicated on **the principle of exhaustion of internal and other available administrative mechanisms for electoral dispute resolution** before approaching the courts as a last resort, pre-election or via an election petition filed after the declaration of election results. In *Francis Gitau Parsimei v The National Alliance Party & 4 others*,<sup>108</sup> the Honourable Justice Majanja of the Constitutional Court stated thus:

More recently, we have a controlling precedent from the Court of Appeal. In the case of *Interim Independent Electoral Commission and Another v Paul Waweru Mwangi CA Civil Application No. 130 of 2011 (Unreported)*, the Court of Appeal discharged an injunction issued by the High Court restraining the then Commission from conducting of the Kamkunji by-election on account of allegations of the breach of fundamental rights and freedoms during the nomination stage. In my view, this insistence of a specific procedure is not inconsistent with the Bill of Rights; it is recognition that election disputes require special rules for determination. These rules are justifiable in a democratic society and the Constitution itself contemplates that the electoral process is a special process. In light of what I have stated, I hereby discharge the orders issued on 17<sup>th</sup> August 2012 in **Nairobi Petition No. 356 of 2012** which had the effect of restraining the 1<sup>st</sup> respondent from forwarding or submitting the 2<sup>nd</sup> respondent's name to the IEBC for nomination for the Kajiado North Parliamentary election. Similarly, I reject the application in **Nairobi Petition No. 359 of 2012** seeking to restrain the 3<sup>rd</sup> respondent from presenting the 2<sup>nd</sup> respondent to the IEBC for nomination as a

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<sup>108</sup> [2012] eKLR, Const Pet No 356 of 2012 (Consolidated with Const Pet No 359 of 2012).

candidate for the Kangema Parliamentary election. It is also my view that **Article 88(4)(e)** and **section 74(1)** of the **Elections Act, 2011** provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed. It must follow that the two petitions filed are incompetent and are hereby struck out but with no order as to costs.<sup>109</sup>

#### **4 Post-Election Dispute Resolution Mechanisms**

The first part of this paper focused on pre-election disputes, which are mostly resolved outside of the Kenyan courts system. This part of the paper shall primarily focus on the post-election disputes that are resolved through the judicial system via election petitions filed in the election courts after the declaration of election results. The timelines and procedure for filing, service, hearing and determination of election petitions and appeals are provided for in the **Constitution**, the **Elections Act, 2011**, **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, as applicable to parliamentary and county elections, the **Court of Appeal (Election Petition) Rules, 2017**, and the **Supreme Court (Presidential Election Petition) Rules, 2017**. A summary of the applicable timelines and procedure is considered when dealing with the management of team dynamics in election petitions later on.

##### **4.1.3 Presentation of Election Petitions**

Election petitions are instituted subsequent to the declaration of election results by IEBC's returning officers.<sup>110</sup> The Elections Act, 2011 has set out provisions concerning the presentation of election petitions in court. Per **section 76 of the Elections Act, 2011**, an election petition can be instituted to:

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<sup>109</sup> Ibid paras 7-12.

<sup>110</sup> Elections Act, 2011, s 39.

- (i) question the validity of an election;<sup>111</sup>
- (ii) seek a declaration that a seat in Parliament or a county assembly has not become vacant;<sup>112</sup>
- (iii) seek a declaration that a seat in Parliament or a county assembly has become vacant;<sup>113</sup>
- (iv) question a return or an election on the ground of a corrupt practice(s);<sup>114</sup>
- (v) question a return or an election on an allegation of an illegal practice(s);<sup>115</sup> or
- (vi) question a return or an election upon an allegation of an election offence.<sup>116</sup>

One, per **section 76(1)(a) of the Elections Act, 2011**, an election petition to question the validity of an election is to be **filed within twenty-eight (28) days** after the date of declaration of the results of the election and **served within fifteen (15) days** of presentation of the petition. It is worth noting that the constitutionality of **section 76(1)(a) of the Elections Act, 2011** was considered in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*,<sup>117</sup> and the Supreme Court stated:

Inssofar as the Constitution (Article 87(2)) provides that: “Petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results...,” while the Elections Act, 2011 (Section 76 (1)) provides that: “A petition – a. to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in

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<sup>111</sup> Ibid s 76(1)(a).

<sup>112</sup> Ibid s 76(1)(b).

<sup>113</sup> Ibid s 76(1)(c).

<sup>114</sup> Ibid s 76(2).

<sup>115</sup> Ibid s 76(3).

<sup>116</sup> Ibid s 76(4).

<sup>117</sup> [2014] eKLR, SCoK Pet No 10 of 2013.

the Gazette...,” and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution.<sup>118</sup>

Two, an election petition seeking a declaration that a seat in Parliament or a county assembly has not become vacant is to be presented within twenty-eight (28) days after the date of publication of the notification of the vacancy by the relevant Speaker.<sup>119</sup> Three, an election petition seeking a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.<sup>120</sup>

An election petition questioning a return or an election on the ground of a corrupt practice(s) must specifically allege a payment of money or other act which has been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice. Such a petition is to be filed within twenty-eight (28) days after the publication of the election results in the *Gazette*.<sup>121</sup>

An election petition questioning a return or an election upon an allegation of an illegal practice must allege a payment of money or other act which has been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition. Such a petition is to be filed within twenty-eight (28) days after the publication of the election results in the *Gazette*.<sup>122</sup>

An election petition filed in time may be amended with the leave of the election court for the purpose of questioning a return or an election upon an allegation of an election offence, within the time within which the petition

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<sup>118</sup> Ibid para 101.

<sup>119</sup> Ibid s 76(1)(b).

<sup>120</sup> Ibid s 76(1)(c).

<sup>121</sup> Ibid s 76(2).

<sup>122</sup> Ibid s 76(3).

questioning the return or the election upon that ground may be presented.<sup>123</sup> Where an election petition has already been presented on other grounds, a **supplemental petition** may be presented in respect of a petition questioning a return or an election under **section 76(2) and (3)**, that is, on the ground of a corrupt practice(s) or on an allegation of an illegal practice(s).

#### **4.1.4 Security for Costs**

Under **section 78(1) of the Elections Act, 2011**, a petitioner is required to deposit security for the payment of costs that may become payable by the petitioner **not more than ten (10) days after the presentation of an election petition**. A deposit of:

- i) KES 1M, in the case of a petition against a presidential candidate;
- ii) KES 500,000, in the case of a petition against a member of Parliament of a county governor; and
- iii) KES 100,000, in the case of a petition against a member of a county assembly.<sup>124</sup>

It is important to note that where a petitioner does not deposit security as required, or if an objection is allowed and not removed, no further proceedings shall be heard on the election petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.<sup>125</sup>

#### **4.1.5 Procedure of the Election Court on Receipt of Petition**

Upon receipt of an election petition, an election court will peruse the petition and may reject the petition summarily if it considers that no sufficient ground for granting the relief claimed is disclosed in the petition, or may fix a date for the trial of the petition.<sup>126</sup>

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<sup>123</sup> Ibid s 76(4).

<sup>124</sup> Ibid s 78(2).

<sup>125</sup> Ibid s 78.

<sup>126</sup> Ibid s79

#### **4.1.6 Powers of the Election Court**

According to **section 80(1) of the Elections Act, 2011**, an election court may, in the exercise of its jurisdiction:

- (a) summon and swear in witnesses in the same manner or, as nearly as circumstances admit, as in a trial by a court in the exercise of its civil jurisdiction and impose the same penalties for the giving of false evidence.
- (b) compel the attendance of any person as a witness who appears to the court to have been concerned in the election or in the circumstances of the vacancy or alleged vacancy.
- (c) examine a witness who is compelled to attend or any other person who has not been called as a witness in court, and examined by a party to the petition and after examination the witness may be cross examined by or on behalf of the petitioner and respondent or either of them.
- (d) decide all matters that come before it without undue regard to technicalities.<sup>127</sup>

A person who refuses to obey an order to attend court commits the offence of contempt of court.<sup>128</sup> In any case, in the proceedings of an election petition, a voter who voted in the elections will not be required to state whom they voted for.<sup>129</sup> Moreover, interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections are to be heard and determined by the election court.<sup>130</sup> Lastly, an election court may by order direct IEBC to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if upon recount of the ballots cast, the winner is apparent and that winner is found not to have committed an election offence.<sup>131</sup>

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<sup>127</sup> Ibid s 80(1).

<sup>128</sup> Ibid s 80(2).

<sup>129</sup> Ibid s 81.

<sup>130</sup> Ibid s 80(3).

<sup>131</sup> Ibid s 80(4).



#### **4.1.7 Appeals to the Court of Appeal**

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only.<sup>132</sup> The appeal is to be filed within thirty (30) days of the decision of the High Court, and will be heard and determined within six (6) months of the filing of the appeal. The appeal shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.<sup>133</sup> Further procedure on such appeals is provided for in the **Court of Appeal (Election Petition) Rules, 2017**.<sup>134</sup>

#### **4.1.8 Certificate of Court as to Validity of an Election**

An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to IEBC and notify the relevant Speaker.<sup>135</sup> The election court may uphold or nullify an election upon determination of the election petition.

### **4.2 Case Studies in Electoral Dispute Resolution in Courts**

#### **4.2.3 Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others**<sup>136</sup>

##### **4.2.3.1 Background**

The Supreme Court was confronted with **the issue of jurisdiction of the courts as pertains to disputes contesting the validity of a political party list submitted to IEBC under article 90 of the constitution**; which is the proper forum and in which way is the court to be approached—through an

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<sup>132</sup> Ibid s 85A (1).

<sup>133</sup> Ibid s 85A (2).

<sup>134</sup> Legal Notice No 114 of 2017.

<sup>135</sup> Elections Act, s 86

<sup>136</sup> [2016] eKLR, SCOK Pet No 1 of 2015 (Judgment delivered on 26 April 2016 by Mutunga; CJ & P, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) <<http://kenyalaw.org/caselaw/cases/view/123322/>>.

election petition or through a constitutional petition or judicial review proceedings?

This matter evolved through the entire hierarchy of Superior Courts, from the High Court to the Supreme Court. The genesis of the matter is a dispute involving the nominations of The National Alliance Party (TNA)'s, the 2<sup>nd</sup> respondent, party-list representatives for gender top-up, youth, and marginalized categories for the Nyandarua County Assembly.<sup>137</sup> Among the key questions in the case was on **the mandate of the election court as regards matters arising from nomination of representatives on the basis of political party lists under article 90 of the Constitution.**

The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents filed a number of **complaints** against the appellants before the **IEBC Dispute Resolution Committee (DRC)**. On 4 May 2013, IEBC's DRC dismissed the first set of complaints, on the grounds *inter alia* that there was insufficient evidence; that the complaints lacked merit; and that those dissatisfied should file formal suits for the recovery of their money, or move the Political Parties Dispute Tribunal (PPDT) as appropriate. Subsequently on 7 June 2013, IEBC's DRC dismissed the second set of complaints, on the ground that the matter was *res judicata* as it had been previously adjudicated upon.

On 9 May 2013, the 5<sup>th</sup> and 6<sup>th</sup> respondents filed ***Esther Njogu & Another v Independent Electoral Commission, Constitutional Petition No 238 of 2013***, at the **High Court** on grounds that: the decision of DRC was unconstitutional; and **violated the Bill of rights and articles 90, 98, 174 and 177 of the Constitution** as it purported to exclude and discriminate against Ndaragwa, Ol' Kalau and Ol' Jororok Constituencies.

On 21 June 2013, the 3<sup>rd</sup> respondent instituted **judicial review proceedings** by filing ***Republic v the Independent Electoral Boundaries Commission & 17 Others Ex-parte Lydia Nyaguthi Githendu***, Nairobi **High Court Miscellaneous Civil Application (Judicial Review) No 218 of 2013**, seeking an order of certiorari to quash the decision of the IEBC's DRC made

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<sup>137</sup> Ibid para 69.

on 7 June 2013 on grounds that it did not conform to the provisions of **articles 90(2)(b) and 177(1)(b) and (c) of the Constitution.**

The High Court declined jurisdiction and dismissed the matters, on grounds that the issues raised were party matters that rest entirely with the political party and its members, and that no error had been disclosed to impugn the Committee's decision.<sup>138</sup> Following the High Court decisions, IEBC on 17 July 2013 through *Gazette Notice* No 9794 dated the same day, designated the appellants as TNA members of Nyandarua County Assembly.

The 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents appealed to the **Court of Appeal** (*Lydia Nyaguthii Githendu v the Independent Electoral Boundaries Commission & Others, Civil Appeal No 224 of 2013*, and *Esther Njogu & Another v the Independent Electoral Boundaries Commission & Others, Civil Appeal No 238 of 2013*). The Court of Appeal heard the two appeals together as matters founded upon the same set of facts and a common legal position, that is, the constitutionality, legality and regularity of the two Nyandarua County Assembly TNA party lists, published by IEBC on 15 and 16 May 2013. The Court of Appeal delivered its judgment on the 23 January 2015.<sup>139</sup> The Court of Appeal considered whether it was properly seized of the matter, and whether the High Court had jurisdiction to entertain the matter in issue and found that both it and the High Court had jurisdiction to entertain the matter. The Supreme Court reported on the same as follows:

The Court [of Appeal] held that it did have jurisdiction, observing that there is a constitutional mandate donated to the Court, to hear all appeals emanating from the High Court. It then held that the matters which had come before the High Court, touched on the

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<sup>138</sup> See *Esther Njogu & 2 others v Independent Electoral and Boundaries Commission & another* [2013] eKLR, HC (Milimani, Const & Human Rights Div), Const Pet No 238 of 2013 (Ngugi, Majanja & Korir JJ) <<http://kenyalaw.org/caselaw/cases/view/83891>>.

<sup>139</sup> *Lydia Nyaguthii Githendu v The Independent Electoral and Boundaries Commission (IEBC) & 17 others* [2015] eKLR, CoA (Nairobi), Civil Appeal No 224 of 2013 (consolidated with Civil Appeal No 238 of 2013) (Nambuye, Warsame & Murgor, JJA) <<http://kenyalaw.org/caselaw/cases/view/105289>>.

constitutionality and the legality of the nomination list submitted to the Commission, pursuant to the relevant provisions of the Constitution and the Elections Act, by TNA as a party, and with respect to Nyandarua County Assembly. The Appellate Court held that the High Court had the mandate to hear the matters, but had erroneously declined jurisdiction.<sup>140</sup>

The Court of Appeal allowed the two appeals and granted the prayers requested in the constitutional petition and the judicial review application filed before the High Court.<sup>141</sup> The respondents being aggrieved by the finding of the Court of Appeal, lodged an appeal at the Supreme Court.

#### **4.2.3.2 Determination**

The Court found that from legislation it is clear that political parties have a responsibility to prepare and submit to IEBC, a party list of all persons who would stand elected if the party were entitled to all the seats; that, ‘**Sections 34(4), 35 and 36 of the Elections Act, 2011 and regulation 54 of the Elections (General) Regulations, 2012** bear the phraseology, “*political party submitting*” or a “*party list submitted by the political party*”.’<sup>142</sup> The law places upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law. The Constitution, by **article 88(4)(e) of the Constitution**, mandates IEBC to intervene and settle disputes relating to, or arising from nominations. However, nowhere does the law grant powers to IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties.<sup>143</sup> The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations.<sup>144</sup>

The question then becomes; At what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly by virtue of **article 177(2)(b) and (c) of the**

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<sup>140</sup> SCoK Pet No 1 of 2015, para 21.

<sup>141</sup> Ibid paras 22 and 23.

<sup>142</sup> Ibid para 92. See article 90(2)(a) of the Constitution of Kenya, 2010.

<sup>143</sup> SCoK Pet No 1 of 2015, para 93.

<sup>144</sup> Ibid para 94.

**Constitution?** Is it after the issuance of *Gazette* Notice by IEBC, or at the close of elections when the nomination process begins?<sup>145</sup>

The Supreme Court found that **the publication of the *Gazette* Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the election courts. The *Gazette* Notice also serves to notify the public of those who have been ‘elected’ to serve as nominated members of a County Assembly.**<sup>146</sup> In doing so, the Supreme Court drew a comparison between nominations under **article 90 of the Constitution** and election into political office by registered voters, and stated as follows:

**The *Gazette Notice* in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the *Joho Case*, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.**<sup>147</sup>

Secondly there was an argument by counsel for the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, that what was before the Court of Appeal (and the High Court) was not an ‘*election petition*’ but a constitutional petition seeking to prevent the violation of the rights of the respondents. Counsel urged the Court to **distinguish between an ‘*election petition*’ and a contestation over the ‘*validity of a political-party list*’.**<sup>148</sup> On this question, the Court found that the broader spectacle is compelling: the electoral-process is dominant; and it allows no separation between **article 90 of the Constitution** (which deals with party-list seats) and **article 177 of the Constitution** (which deals with membership of county assemblies). This was a petition contesting the

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<sup>145</sup> Ibid para 101.

<sup>146</sup> Ibid para 107.

<sup>147</sup> Ibid para 106.

<sup>148</sup> Ibid para 108.

nomination of the appellants, nomination which is an integral part of the electoral process, in the terms of the Constitution and electoral law.

**It follows that only an election court had the powers to disturb the *status quo*. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with section 75 of the Elections Act, 2011.** The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the PPDT but the Court of Appeal assumed jurisdiction and granted the orders sought at the High Court.<sup>149</sup> **However, the orders of the Court of Appeal had the effect of annulling the appointment of the appellants, whose names had been gazetted, and who had taken the oath of office as the TNA-nominated members of Nyandarua County Assembly, which was contrary to article 87 of the Constitution and section 85A of the Elections Act, 2011 because it had not been moved as an election court.<sup>150</sup> In essence, both an election by registered voters and an election by nomination under article 90 of the Constitution can only be challenged through an election petition and not any other mechanism.**

**The Supreme Court importantly stated that to allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165(3) of the Constitution, or through judicial review proceedings carries the risk of opening up a parallel electoral dispute-resolution regime.** Such an event would serve not only to complicate, but ultimately, to defeat the *sui generis* character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.<sup>151</sup> Further, the Supreme expressed the view that, **‘Our electoral dispute-resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These**

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<sup>149</sup> Ibid para 110

<sup>150</sup> Ibid paras 111-118.

<sup>151</sup> Ibid para 119

**have to comply with the Constitution, and the electoral laws and regulations.’<sup>152</sup>**

The Supreme Court thus issued orders that set aside the judgment and orders of the Court of Appeal of 23 January 2015 and allowed the petition of appeal.<sup>153</sup>

#### **4.2.4 Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others<sup>154</sup>**

This case allowed the Supreme Court to pronounce itself **on the issue of delimitation of electoral jurisdiction between IEBC and the election courts**, a highly contested issue that had brought a multiplicity of suits. In a judgment delivered on 4 February 2014, the Court stated as follows:

The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer’s mandate, thus shifting any issue as to validity, to the election Court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer. After these results have been delivered to the Commission, the *Commission is mandated to publish a notice in the Gazette,*

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<sup>152</sup> Ibid para 121.

<sup>153</sup> Ibid para 123.

<sup>154</sup> [2014] eKLR, SCoK, Pet No 10 of 2013 (Rawal, DCJ, Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ) <<http://kenyalaw.org/caselaw/cases/view/93989/>>.

which may form part of a composite notice, showing the names of the person or persons elected [**Regulation 87 (4)(b)**]. (...) In our considered view the **Gazette Notice** and/or publication of election results, is simply the *affirmation of the election results declared by the returning officer*.<sup>155</sup>

The Supreme Court also consider the following issues:

- i) What is the meaning of ‘declaration of election results?’
- ii) Who declares the election results?
- iii) Which instrument, if any, is used to declare election results?
- iv) What is the import of the Gazette notice, and what is the role of the Chairperson of the Commission in declaring election results?<sup>156</sup>

On the issue regarding **which instrument is used to declare election results**,<sup>157</sup> the Supreme Court held that **section 76(1)(a) of the Elections Act, 2011** is inconsistent with **article 87(2) of the Constitution** and, to that extent, is a nullity.<sup>158</sup> According to the Court, the purpose of the *Gazette Notice* in **section 76(1)(a) of the Elections Act, 2011** cannot be termed as the instrument of declaration of the election results.<sup>159</sup> *Gazettement* is one of the mechanisms through which the State publishes information to the public and the public nature of elections demands that the outcome of the polling is shared with the public. At **paragraph 101 of the judgment**, the Supreme Court analysed the issue on the constitutionality of **section 76(1)(a) of the Elections Act, 2011** as follows:

In so far as the Constitution (Article 87(2)) provides that: **“Petitions concerning an election other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results...,”** while the Elections

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<sup>155</sup> SCoK Pet No 10 of 2013, paras 65 and 66.

<sup>156</sup> Ibid para 67.

<sup>157</sup> Ibid paras 94-101.

<sup>158</sup> Ibid para 103.

<sup>159</sup> Ibid para 99.



Act, 2011 (Section 76 (1)) provides that: “**A petition – a. to question the validity of an election shall be filed within twenty-eight days after the date of publication of the results of the election in the Gazette...**,” and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution. By Article 2(4) of the Constitution, “**Any law...that is inconsistent with this Constitution is void to the extent of the inconsistency, any act or omission of the Constitution is invalid**”.

## **5 Litigating Election Petitions**

Election petitions are instituted subsequent to the declaration of election results by IEBC and can arise in respect of **presidential, parliamentary and county elections and include by-elections**.<sup>160</sup> Presidential elections concern elections to the office of President. **Articles 140, 163(3)(a), and 165(5)(a) of the Constitution of Kenya, 2010 (the Constitution)** give the Supreme Court exclusive original and final jurisdiction to hear and determine disputes relating to presidential elections.<sup>161</sup> Parliamentary elections concern elections of members of the National Assembly or the Senate, which together comprise Members of the Parliament of Kenya. **Article 105(1) of the Constitution** gives the High Court jurisdiction to hear and determine any question as to whether a person has been validly elected as a Member of Parliament, or whether the seat of a Member of Parliament has become vacant.<sup>162</sup>

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<sup>160</sup> See definition of ‘*election*’ in section 2 of the Elections Act, 2011, Act No 21 of 2011, Laws of Kenya.

<sup>161</sup> Articles 136-140 of the Constitution of Kenya, 2010 concern election of the president; qualifications and disqualifications for election as president; procedure at presidential election; procedure to be followed in case of death of a president-elect after being declared elected as president, but before assuming office; and questions as to validity of presidential election.

<sup>162</sup> Articles 97-105 of the Constitution of Kenya, 2010 concern elections to and membership of the Parliament of Kenya.

County elections concern elections of county governors and members of county assemblies.<sup>163</sup> **Section 75(1) of the Elections Act, 2011** gives the High Court within the county or nearest to the affected county, jurisdiction in respect of a question as to the validity of an election of a county governor. On the other hand, **section 75(1A) of the Elections Act, 2011** gives Resident Magistrates Courts to be designated as such by the Chief Justice, jurisdiction in respect of a question as to the validity of the election of a member of a county assembly (MCA).

Election petitions are heard and determined by an election court.<sup>164</sup> **Section 2 of the Elections Act, 2011** defines an 'election court' to mean '*the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with section 75 of [the Elections] Act.*'

Litigating election petitions can bring together more than one advocate or firm to represent a party to the dispute (litigation team). This part of the paper considers the dynamics of litigating election petitions in teams, in terms of the timelines and procedures in respect of election petitions that necessitate the need to manage litigation team dynamics towards an ultimate desirable and expeditious resolution of an election petition.

### **5.1 Team Dynamics in Litigating Election Petitions**

The special nature of election petitions as a component of the larger EDR mechanisms makes them complex, urgent, and demanding of thought and skill. As a result, a one-man job may not be able to pull through, thereby necessitating the need for a litigation team for the proper execution of an election petition. There are stringent timelines to be met. There are special

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<sup>163</sup> Articles 177 and 193 of the Constitution of Kenya, 2010 concern the membership of county assembly and qualifications for election as member of county assembly; Article 180 of the Constitution concerns election of county governor and deputy county governor.

<sup>164</sup> See rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

laws and rules of procedure applicable in the context of election petitions. There is need to strategize quickly to best represent your client and outsmart the opponent. There is urgent need for research and analysis of voluminous documents, including documents and materials to be relied on as evidence, and the opponent's pleadings. There is need to draft proper and stellar pleadings to articulate your client's case with accuracy, correctness and completeness. There is limited time to present the best and winning argument before the election court covering all the vital aspects of your client's case.

These multiple components involved in the litigation of election petitions necessitates that a litigation team be on top of their game. Rebecca Green notes the information imbalance that may arise in post-election dispute resolution based on the expertise and preparedness of a litigation team in comparison to the opponent; an imbalance which may have devastating effects for both the candidate (the client) and the voters:

One campaign might hire a sophisticated legal team that understands how various process decisions affect its candidate. If the other campaign has not hired a sophisticated election attorney (or if the attorney hired proves to be less skillful than opposing counsel) this imbalance might prove a great disadvantage. This disadvantage is not just problematic for the candidate, but also for the voters who selected that candidate. In a recount scenario, poor or uninformed lawyering can result in the disenfranchisement of voters. (...) [S]tate election administrators and judges also vary widely in process sophistication.<sup>165</sup>

Generally, and as concerns election petitions, litigating in teams is wrought with both advantages and disadvantages. Election petitions in particular tend to draw large litigation teams. The outstanding advantage of such large litigation teams seems to be the ability to divide up the various issues that

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<sup>165</sup> Rebecca Green, 'Mediation and Post-Election Litigation: A Way Forward,' (2012), 27(2) *Ohio State Journal on Dispute Resolution* 325-379, 349 <<https://core.ac.uk/download/pdf/159589369.pdf>>.

are up for determination amongst the advocates or firms based on their skill sets and expertise. Dividing up the issues among the advocates or firms constituting a litigation team is actually necessary to allow an advocate or team of advocates to pay special and particular attention to one or two issues, keeping in mind the tight timelines for the hearing and determination of election petitions. The disposal of election petitions is done on the foundation of expeditious disposal of matters and in tandem with **article 87(1) of the Constitution**.

Litigation teams handling election petitions, like in other matters, must adhere to professional rules and guidelines for advocates under the **Advocates Act (Cap 16)** and the attendant practice rules and regulations in their interactions with one another and in assisting the court to further the overriding objective. Professional etiquette and civility in personal interactions and correspondences is necessary, especially timely service and response to pleadings. In any case, litigating election petitions requires the sacrifice of time in terms of working long hours into the night to be able to file stellar pleadings within the stipulated timelines.

## **5.2 Timelines and Procedures in respect of Election Petitions**

**Section 85 of the Elections Act, 2011** is categorical that an election petition is to be heard and determined within the period specified in the Constitution. The timelines and procedure in respect of election petitions are provided for in the **Constitution**, the **Elections Act, 2011**, **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, as applicable to parliamentary and county elections,<sup>166</sup> the **Court of Appeal (Election Petition) Rules, 2017**, and the **Supreme Court (Presidential Election Petition) Rules, 2017**. **Rule 4(1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** is categorical that the objective of

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<sup>166</sup> As provided in **rule 3 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, the rules only apply in respect of election of members of Parliament, county governors, and members of county assemblies. **Rule 2** defines an “election court” to mean “the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3)(a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of the [Elections] Act.”

the Rules is to **facilitate the just, expeditious, proportionate, and affordable resolution of election petitions**, in this case, parliamentary and county elections.

**Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** provides for the form and content of a parliamentary or county election petition. The election petition, which is supported by an affidavit sworn by the Petitioner,<sup>167</sup> is drafted using **Form 1 in the First Schedule of the Rules**. The election petition is divided into paragraphs confined to a distinct subject and numbered consecutively, and will state:

- (a) the name and address of the petitioner;
- (b) the date when the election in dispute was conducted;
- (c) the results of the election, if any, and however declared;
- (d) the date of the declaration of the results of the election;
- (e) the grounds on which the petition is presented;
- (f) the name and address of the advocate, if any, for the petitioner which shall be the address for service; and
- (g) the relief sought (such as a declaration on whether or not the candidate whose election is questioned was validly elected; a declaration of which candidate was validly elected; an order as to whether a fresh election should be held; scrutiny and recounting of the ballots cast at the election in dispute; payment of costs; or a determination as to whether or not electoral malpractice of a criminal nature may have occurred.)

**IEBC is a Respondent in every election petition.**<sup>168</sup> A response to a parliamentary or county election is filed within seven (7) days of service of

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<sup>167</sup> See Ibid rules 8(4)(b) and 12.

<sup>168</sup> Ibid rule 9.

the petition on the Respondents and is drafted as in **Form 4 in the First Schedule to the Rules.**<sup>169</sup>

The timelines and procedures in respect of election petitions can be summarised as follows:

	Presidential Elections	Parliamentary Elections	County Elections: County Governor	County Elections: MCA
<b>When and where to file the petition</b>	Article 140(1) of the Constitution – file the petition in the Supreme Court within seven (7) days after the date of the declaration of the results of the presidential election; and before 1400 hrs if filed on the last day available for filing (Rule 7(3) of the Supreme Court (Presidential Election Petition) Rules, 2017). – See also articles 163(3)(a) and 165(5)(a) of the Constitution.	– Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Article 105(1) of the Constitution – the petition is filed in the High Court.	Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the Petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Section 75(1) of the Elections Act, 2011 – the petition is filed in the High Court within the county or nearest to the county.	Article 87(2) of the Constitution and sections 76(1) and 77(1) of the Elections Act, 2011 – file the petition within twenty-eight (28) days after the declaration of the election results by IEBC. – Section 75(1A) of the Elections Act, 2011 – the petition is filed in the Resident Magistrate’s Court designated by the Chief Justice.
<b>When Petitione</b>	– Section 78(1) of the Elections Act,	– Section 78(1) of the Elections Act, 2011 –	– Section 78(1) of the Elections Act,	– Section 78(1) of the Elections Act, 2011 – within ten

<sup>169</sup> Ibid rule 10 and 11 on service of the election petition on the Respondent and response to the petition, respectively.

<p><b>r is to deposit security for costs</b></p>	<p>2011 – within <b>ten (10)</b> days after the presentation of the presidential election petition.                  – <b>Section 78(2)(a) of the Elections Act, 2011</b> – deposit <b>KES 1 Million</b> in respect of a presidential election petition.                  – <b>Section 78(3) of the Elections Act, 2011</b> – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.                  – <b>Section 84 of the Elections Act, 2011</b> – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.</p>	<p>within <b>ten (10)</b> days after the presentation of the parliamentary election petition.                  – <b>Section 78(2)(b) of the Elections Act, 2011</b> – deposit <b>KES 500,000/=</b> in respect of a parliamentary election petition.                  – <b>Section 78(3) of the Elections Act, 2011</b> – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.                  – <b>Section 84 of the Elections Act, 2011</b> – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.</p>	<p>2011 – within <b>ten (10)</b> days after the presentation of the gubernatorial election petition.                  – <b>Section 78(2)(b) of the Elections Act, 2011</b> – deposit <b>KES 500,000/=</b> in respect of a gubernatorial election petition.                  – <b>Section 78(3) of the Elections Act, 2011</b> – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.                  – <b>Section 84 of the Elections Act, 2011</b> – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.</p>	<p>(10) days after the presentation of the MCA election petition.                  – <b>Section 78(2)(c) of the Elections Act, 2011</b> – deposit <b>KES 100,000/=</b> in respect of a MCA election petition.                  – <b>Section 78(3) of the Elections Act, 2011</b> – the Respondent may apply for dismissal of the petition with costs if the Petitioner fails to deposit security as required.                  – <b>Section 84 of the Elections Act, 2011</b> – an election court shall award the costs of and incidental to a petition, which costs shall follow the cause.</p>
<p><b>When and how to serve the petition</b></p>	<p><b>Article 87(3) of the Constitution</b> –the petition may be served directly or by advertisement in a newspaper with national circulation.                  – <b>Served within 24 hours of filing</b> the petition and <b>served through electronic</b></p>	<p>– <b>Article 87(3) of the Constitution</b> and <b>section 77(2) of the Elections Act, 2011</b> – the petition may be served personally upon a Respondent or by advertisement in a</p>	<p>– <b>Article 87(3) of the Constitution</b> and <b>section 77(2) of the Elections Act, 2011</b> – the petition may be served personally upon a Respondent or by advertisement in a newspaper with</p>	<p>– <b>Article 87(3) of the Constitution</b> and <b>section 77(2) of the Elections Act, 2011</b> – the petition may be served personally upon a Respondent or by advertisement in a newspaper with national circulation.</p>

	means within 6 hours of filing the petition – Rule 10 of the Supreme Court (Presidential Election Petition) Rules, 2017).	newspaper with national circulation. <sup>170</sup> – Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within <b>fifteen (15) days</b> of presentation. <sup>171</sup>	national circulation. – Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within <b>fifteen (15) days</b> of presentation. <sup>172</sup>	– Section 76(1)(a) of the Elections Act, 2011 – a petition to question the validity of an election shall be served within <b>fifteen (15) days</b> of presentation. <sup>173</sup>
<b>When to respond to the petition</b>	– Respondents, usually the persons declared as President-elect and deputy President-elect, IEBC, and the Chairperson of IEBC as the returning officer for presidential elections, <sup>174</sup> file a <b>response to the petition (in Form B in the Second Schedule plus replying affidavit)</b>	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC, <sup>175</sup> file a response to the election petition within <b>seven (7) days</b> of service of the petition and serve the response within <b>seven (7) days</b> of filing. <sup>176</sup>	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC, <sup>177</sup> file a response to the election petition within <b>seven (7) days</b> of service of the petition and serve the response within <b>seven (7) days</b> of filing. <sup>178</sup>	– Respondents, usually the person whose election is challenged, the returning officer, and IEBC, <sup>179</sup> file a response to the election petition within <b>seven (7) days</b> of service of the petition and serve the response within <b>seven (7) days</b> of filing. <sup>180</sup>

<sup>170</sup> Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 defines “direct service” as “personal service or service on a duly authorized agent.”

<sup>171</sup> See Ibid rule 10.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

<sup>174</sup> See e.g., *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, Supreme Court of Kenya, Presidential Election Pet No 1 of 2017.

<sup>175</sup> Definition of “respondent” in rule 2 of the of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

<sup>176</sup> Ibid rule 11.

<sup>177</sup> Ibid rule 2.

<sup>178</sup> Ibid rule 11.

<sup>179</sup> Ibid rule 2.

<sup>180</sup> Ibid rule 11.



	<p>within 4 days of service of the petition – Rule 11 of the Supreme Court (Presidential Election Petition) Rules, 2017); or file notice of intention not to oppose the petition (in Form C in the Second Schedule) within three (3) days of service of the petition and serve on the petitioner.</p>			
<p><b>Procedure of the Court upon receipt of the petition</b></p>	<p>– Section 79 of the Elections Act, 2011 – upon receipt of a petition, an election court will peruse the petition and:</p> <p>(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or</p> <p>(b) fix a date for the trial of the petition.</p>	<p>– Section 79 of the Elections Act, 2011 – upon receipt of a petition, an election court will peruse the petition and:</p> <p>(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or</p> <p>(b) fix a date for the trial of the petition.</p>	<p>– Section 79 of the Elections Act, 2011 – upon receipt of a petition, an election court will peruse the petition and:</p> <p>(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or</p> <p>(b) fix a date for the trial of the petition.</p>	<p>– Section 79 of the Elections Act, 2011 – upon receipt of a petition, an election court will peruse the petition and:</p> <p>(a) if it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the petition summarily; or</p> <p>(b) fix a date for the trial of the petition.</p>
<p><b>How long the court has to determine</b></p>	<p>– Article 140(2) of the Constitution – within fourteen (14) days after the filing of a presidential</p>	<p>– Article 105(2) of the Constitution – the High Court is to hear and determine a parliamentary election petition within six (6)</p>	<p>Section 75(2) of the Elections Act, 2011 – the High Court is to hear and determine a gubernatorial</p>	<p>Section 75 of the Elections Act, 2011 does not specify the timeline for the hearing and determination of a MCA election</p>

<p><b>e the petition</b></p>	<p>election petition, the Supreme Court shall hear and determine the petition and its decision shall be final. See also <b>Rule 23 of the Supreme Court (Presidential Election Petition) Rules, 2017).</b>                  – <b>Section 79 of the Elections Act, 2011</b> – interlocutory matters in connection with a petition challenging results of presidential elections shall be heard and determined by the election court.</p>	<p><b>months</b> of the date of lodging the petition.                  – <b>Section 79 of the Elections Act, 2011</b> – interlocutory matters in connection with a petition challenging results of parliamentary elections shall be heard and determined by the election court.</p>	<p>election petition within <b>six (6) months</b> of the date of lodging the petition.                  – <b>Section 79 of the Elections Act, 2011</b> – interlocutory matters in connection with a petition challenging results of gubernatorial elections shall be heard and determined by the election court.</p>	<p>petition, which is heard by Resident Magistrate’s Court designated by the Chief Justice.                  – <b>Section 79 of the Elections Act, 2011</b> – interlocutory matters in connection with a petition challenging results of MCA elections shall be heard and determined by the election court.</p>
<p><b>Relief granted</b></p>	<p><b>Article 140(3) of the Constitution</b> – if the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days (60) after the determination.                  – <b>Section 80(4) of the Elections Act, 2011</b> – an election court may by order direct IEBC to issue a certificate</p>	<p>– <b>Section 80(4) of the Elections Act, 2011</b> – an election court may by order direct IEBC to issue a certificate of election to a Member of Parliament if—                  (a) upon recount of the ballots cast, the winner is apparent; and                  (b) that winner is found not to have committed an election offence.                  – <b>Section 82 of the Elections Act, 2011</b> – an order for a scrutiny of votes and recounting of ballots cast, upon an</p>	<p><b>Section 75(3) of the Elections Act, 2011</b>– the court may grant appropriate relief, including:                  (a) a declaration of whether or not the candidate whose election is questioned was validly elected;                  (b) a declaration of which candidate was validly elected; or                  (c) an order as to whether a fresh</p>	<p><b>Section 75(3) of the Elections Act, 2011</b>– the court may grant appropriate relief, including:                  (a) a declaration of whether or not the candidate whose election is questioned was validly elected;                  (b) a declaration of which candidate was validly elected; or                  (c) an order as to whether a fresh election will be held or not.</p>

	<p>of election to a President if—</p> <p>(a) upon recount of the ballots cast, the winner is apparent; and</p> <p>(b) that winner is found not to have committed an election offence.</p> <p>– <b>Section 82 of the Elections Act, 2011</b> – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting <i>suo moto</i>.</p> <p>– <b>Section 86(1) of the Elections Act, 2011</b> – a certificate of court as to the validity of a presidential election.</p> <p>– <b>Section 86A, (1B) and (1C) of the Elections Act, 2011</b> – procedure in case of invalidation of a presidential election under <b>article 140(3) of the Constitution</b>.</p> <p>– <b>Section 87 of the Elections Act, 2011</b> – a determination and</p>	<p>application by a party during the hearing of an election petition, or the court acting <i>suo moto</i>.</p> <p>– <b>Section 86(1) of the Elections Act, 2011</b> – a certificate of court as to the validity of a parliamentary election.</p> <p>– <b>Section 87 of the Elections Act, 2011</b> – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.</p>	<p>election will be held or not.</p> <p>– <b>Section 82 of the Elections Act, 2011</b> – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting <i>suo moto</i>.</p> <p>– <b>Section 86(1) of the Elections Act, 2011</b> – a certificate of court as to the validity of a gubernatorial election.</p> <p>– <b>Section 86(1A), (1B) and (1C) of the Elections Act, 2011</b> – procedure in case of invalidation of a gubernatorial election.</p> <p>– <b>Section 87 of the Elections Act, 2011</b> – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions</p>	<p>– <b>Section 80(4) of the Elections Act, 2011</b> – an election court may by order direct IEBC to issue a certificate of election to a MCA if:</p> <p>(a) upon recount of the ballots cast, the winner is apparent; and</p> <p>(b) that winner is found not to have committed an election offence.</p> <p>– <b>Section 82 of the Elections Act, 2011</b> – an order for a scrutiny of votes and recounting of ballots cast, upon an application by a party during the hearing of an election petition, or the court acting <i>suo moto</i>.</p> <p>– <b>Section 86(1) of the Elections Act, 2011</b> – a certificate of court as to the validity of a MCA election.</p> <p>– <b>Section 87 of the Elections Act, 2011</b> – a determination and order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions</p>
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	order of the election court on the occurrence of an electoral malpractice of a criminal nature, to be transmitted to the Director of Public Prosecutions (DPP) for criminal investigation and prosecution.		(DPP) for criminal investigation and prosecution.	(DPP) for criminal investigation and prosecution.
<b>When to appeal</b>	No appeal.	<p>– <b>Section 85A(1) of the Elections Act, 2011</b> – an appeal from the High Court in an election petition concerning membership of the National Assembly or Senate shall lie to the Court of Appeal on matters of law only and shall be:</p> <p>(a) filed within <b>thirty (30) days</b> of the decision of the High Court; and</p> <p>(b) be heard and determined within <b>six (6) months</b> of the filing of the appeal.</p> <p>– A first appeal to the <b>Court of Appeal</b> in accordance with <b>article 164(3)(a) of the Constitution</b>, the <b>Court of Appeal Rules, 2010</b>,<sup>181</sup> and <b>Court of</b></p>	<p>– <b>Section 85A(1) of the Elections Act, 2011</b> – an appeal from the High Court in an election petition concerning the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:</p> <p>(a) filed within <b>thirty (30) days</b> of the decision of the High Court; and</p> <p>(b) be heard and determined within <b>six (6) months</b> of the filing of the appeal.</p> <p>– A first appeal to the <b>Court of Appeal</b> in accordance with <b>article 164(3)(a) of</b></p>	<p><b>Section 75(4) of the Elections Act, 2011</b> – an appeal lies to the <b>High Court</b> on matters of law only, which appeal must be filed within <b>thirty (30) days</b> of the decision of the Resident Magistrate’s Court.</p> <p>– <b>Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017</b> makes provision on appeals from Resident Magistrates’ Courts to the High Court, which take the form of a memorandum of appeal.</p>

<sup>181</sup> Rule 35 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

		<p>Appeal (Election Petition) Rules, 2017.</p> <p>– Rule 6 of the Court of Appeal (Election Petition) Rules, 2017 requires the notice of appeal (in the Form EPA 1 set out in the Schedule) to be filed within seven (7) days of the date of the decision appealed against, without necessarily extracting the decree or order of the High Court. Under Rule 7, a notice of appeal is to be served within five (5) days of filing and the Respondent is to file a notice of address of service within five (5) days of service. Per Rule 9, a record of appeal is to be filed within thirty (30) days of the date of the judgment of the High Court, and is to be served within five (5) days of filing. Under Rules 10 and 11, a notice of cross-appeal (in the Form EPA 2 set out in the Schedule) is filed within seven (7) days of service of the record of appeal and served with five (5) days of service;</p>	<p>the Constitution, the Court of Appeal Rules, 2010,<sup>182</sup> and Court of Appeal (Election Petition) Rules, 2017.</p> <p>– Section 85A(2) of the Elections Act, 2011 – an appeal to the Court of Appeal under section 85A(1) of the Act shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.</p> <p>– A further appeal to the Supreme Court in accordance with article 163(3)(b)(i), (4) and (5) of the Constitution.</p>	
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<sup>182</sup> Ibid.

		<p>application to strike out the notice of appeal and the record also follow the same timelines <b>(Rule 19)</b>.</p> <p><b>N.B.:</b> The notice of appeal acts as a stay of the judgment/order/decreed of the High Court but shall lapse if no record of appeal is filed within thirty (30) days of the judgment of the High Court <b>(Rule 18)</b>.</p> <p>– <b>Section 85A(2) of the Elections Act, 2011</b> – an appeal to the Court of Appeal under <b>section 85A(1) of the Act</b> shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.</p> <p>– A further appeal to the <b>Supreme Court</b> in accordance with <b>article 163(3)(b)(i), (4) and (5) of the Constitution</b>.</p>		
<p><b>How long for the court to determine the appeal</b></p>	<p>Not applicable</p>	<p>– <b>Rule 23 of the Court of Appeal (Election Petition) Rules, 2017</b> – the appeal shall be heard and determined within six (6) months of the date of judgment of the High Court.</p> <p>– <b>Rule 27 of the Court of Appeal (Election Petition) Rules, 2017</b> –</p>	<p>– <b>Rule 23 of the Court of Appeal (Election Petition) Rules, 2017</b> – the appeal shall be heard and determined within six (6) months of the date of judgment of the High Court.</p>	<p><b>Section 75(4)(b) of the Elections Act, 2011</b>, appeals from the Resident Magistrate Court to the High Court, on points of law only, must be heard and determined within <b>six (6) months</b> from</p>

		upon filing an appeal, the Appellant must deposit a sum of KES 500,000/= as security for costs of the appeal.	- <b>Rule 27 of the Court of Appeal (Election Petition) Rules, 2017</b> – upon filing an appeal, the Appellant must deposit a sum of KES 500,000/= as security for costs of the appeal.	the date of filing of the appeal.
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### 5.3 Case Studies on Team Dynamics in Litigating Election Petitions

Prof. Tom Ojienda & Associates has handled a number of election petitions before the election courts, including other electoral disputes handled via other judicial means. Some of the cases handled are:

(a) ***Joseph Oyugi Magwanga & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR, HC (Homa Bay), Election Pet No 1 of 2017, (Karanja, J), judgment dated 20 February 2018:**

- Appearing for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.
- Challenging the election of the County Governor for the County of Homa Bay that declared the 3<sup>rd</sup> Respondent as the winner.
- Election of the 3<sup>rd</sup> Respondent (County Governor, Homa Bay County) invalidated.

(b) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR, CoA (Kisumu) Election Pet Appeal No 5 of 2018 (*Waki, Sichale & Otiemo-Odek JJA*), judgment dated 19 July 2018** (being an appeal from the High Court of Kenya at Homa-Bay in Election Pet No 1 of 2017):

- Appearing alongside James Orengo SC and Otiende Amollo SC for the Appellants.

- Challenging the High Court’s decision to invalidate the election of the County Governor, Homa Bay County and that declared the 1<sup>st</sup> Appellant as the winner.
  - Appeal dismissed.
- (c) ***Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ), judgment dated 7 February 2019** (being an appeal from the judgment and decree of the Court of Appeal at Kisumu in Court of Appeal Election Pet No 5 of 2018):
- Appearing alongside James Orengo, SC and Otiende Amollo, SC for the Appellants.
  - Challenging the Court of Appeal’s decision in affirming the trial court’s decision in invalidating the Appellant’s election as declared by IEBC.
  - Appeal allowed and the election results for County Governor, Homa Bay County found to be valid.
- (d) ***Lenny Maxwell Kivuti v The Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2018] eKLR, HC (Embu), Election Pet No 1 of 2017, (Musyoka, J), judgment dated 22 February 2018:**
- Appearing for the Petitioner.
  - Challenging the declaration of the 3<sup>rd</sup> Respondent as the County Governor, Embu County.
  - Election of the 3<sup>rd</sup> Respondent (County Governor, Embu County) invalidated.
- (e) ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others, CA (Nyeri) Election Pet Appeal No 6 of 2018*** (Being an appeal from the High Court of Kenya at Embu in Election Pet No 1 of 2017),



**(Ouko, Musinga and Sichale, JJA), judgment dated 17 August 2018:**

- Appearing for the 1<sup>st</sup> Respondent.
- Challenging the High Court's decision to invalidate the election of County Governor, Embu County and that declared the Appellant as the winner.
- Appeal allowed, judgment of the HC set aside.

**(f) *Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2019] eKLR, SCoK (Nairobi) Pet No 17 of 2018, (*Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ*) judgment dated 30 January 2019** (being an appeal from the judgment and decree of the Court of Appeal at Nyeri in Court of Appeal Election Pet No 6 of 2018):

- Appearing alongside Ngatia, SC for the Petitioner.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in invalidating the 3<sup>rd</sup> Respondent's election as declared by IEBC.
- Appeal dismissed.

**(g) *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR, HC (Nairobi), Election Pet No 1 of 2013, (*Mwongo, PJ*):**

- Appearing for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
- Petition challenging the declaration of the 4<sup>th</sup> Respondent as County Governor, Nairobi County.
- Election of the 4<sup>th</sup> Respondent (County Governor, Nairobi County) upheld.

**(h) *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] eKLR, CoA (Nairobi) Election Pet Appeal No 324 of 2013 (*Warsame, Kariuki***

**and Kiage, JJA**) (being an appeal from the High Court of Kenya at Nairobi in Election Pet No 1 of 2013):

- Appearing alongside Mr. Mugambi, for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
- An election petition appeal challenging the High Court's decision in upholding the election results for County Governor, Nairobi County.
- Appeal allowed.

(i) **Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others** [2014] eKLR, SCoK (Nairobi) Pet No 18 of 2014 (Mutunga, CJ & P; Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ) (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 324 of 2013):

- Appearing alongside Nowrojee, SC and Oduol for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the 1<sup>st</sup> Appellant's election as declared by IEBC.
- Appeal allowed.

(j) **Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others** [2013] eKLR, HC (Meru), Election Pet No 1 of 2013, (Makau, J), judgment dated 23 September 2013:

- Challenging the declaration of the 1<sup>st</sup> Respondent as County Governor, Meru County.
- Election of the 1<sup>st</sup> Respondent (County Governor, Meru County) upheld.

(k) **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others** [2014] eKLR, CoA (Nyeri) Election Pet Appeal No 38 of 2013, (Visram, Mohammed and Otieno-Odek, JJA), judgment dated 12

**March 2014** (being an appeal from the High Court of Kenya at Meru in Election Pet No 1 of 2013):

- Challenging the High Court's decision in upholding the election results for County Governor, Meru County.
- Appeal allowed.

(l) ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others [2014] eKLR, SCoK (Nairobi), Pet No 2B of 2014*** (Mutunga, CJ & P; Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ) (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 38 of 2013):

- Appearing alongside Okong'o Omogeni, SC for the Appellant.
- Challenging the Court of Appeal's decision in dismissing the trial court's decision in upholding the Appellant's election as declared by the 2<sup>nd</sup> Respondent.
- Appealed allowed.

(m) ***Aziz Kassim Ibrahim v Independent Electoral and Boundaries Commission (IEBC) & 4 others [2017] eKLR, CMCC (Milimani, Nairobi), Election Pet No 6A of 2017, (Hon Gesora, CM), judgment dated 24 January 2018:***

- Appearing for the Petitioner.
- Challenging the election results for the position of Member of County Assembly, Kwa Njenga Ward, which declared the 5<sup>th</sup> Respondent as the winner.
- Election of the 5<sup>th</sup> Respondent (MCA, Kwa Njenga Ward) upheld.

(n) ***Musa Cherutich Sirma v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2018] eKLR, HC (Kabarnet), Election Pet No 1 of 2017, (Muriithi J), judgment dated 2 March 2018:***

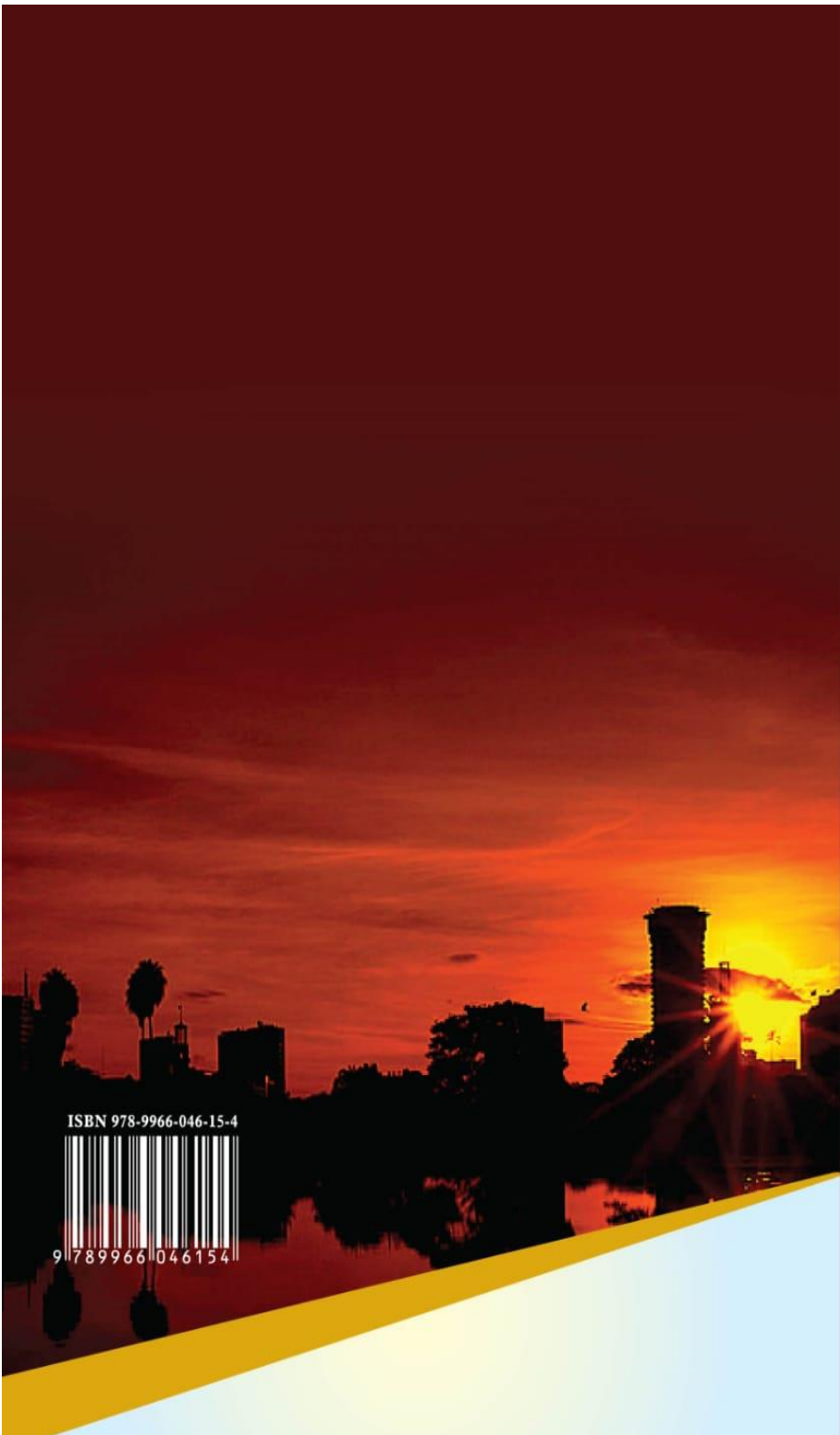
- Appearing for the Petitioner.
  - Challenging the election results for the position of Member of National Assembly, Eldama Ravine Constituency, which declared the 3<sup>rd</sup> Respondent as the winner.
  - Election of the 3<sup>rd</sup> Respondent (Member of National Assembly, Eldama Ravine Constituency) upheld.
- (o) ***Hussein Abshiro Herin & 23 others v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, HC (Nairobi), Election Pet No 7 of 2017, (Ong’udi J), judgment dated 27 February 2017:**
- Appearing for the Petitioners.
  - Challenging the election results for the position of Member of National Assembly, Mandera North Constituency, which declared the 3<sup>rd</sup> Respondent as the winner.
  - Election of the 3<sup>rd</sup> Respondent (Member of National Assembly, Mandera North Constituency) upheld.
- (p) ***Geoffrey Okuto Otieno v Orange Democratic Movement & 2 others* [2017] eKLR, HC (Nairobi), Election Pet Appeal No 61 of 2017, (Riechi, J), judgment dated 25 May 2017** (being an appeal from the decision of the PPDT in case No 177 of 2017):
- Appearing for the Appellant.
  - Challenging the decision of the PPDT directing the 1<sup>st</sup> Respondent to undertake a fresh nomination process for MCA Hospital Ward, Mathare Constituency.
  - Appeal dismissed and 1<sup>st</sup> Respondent directed to conduct fresh nomination exercise.
- (q) ***Joseph Mboya Nyamuthe v Orange Democratic Movement & 4 others* [2017] eKLR, HC (Nairobi), Election Pet Appeal No 5 of 2017, (Onyiego, J), judgment dated 10 May 2017** (being an appeal from the decision of the PPDT in Complaint No 69 of 2017):

- Appearing for the 2<sup>nd</sup> Respondent.
  - Challenging the decision of the PPDT to dismiss the Appellant's claim that it lacked jurisdiction to hear the matter.
  - Appeal allowed and the dismissal by the PPDT set aside.
- (r) ***Abdirahman Adan Abdikadir & another v Independent Electoral & Boundaries Commission & 2 others* [2018] eKLR, HC (Nairobi), Election Pets No 13 & 16 of 2017, (Mwongo, PJ), judgment of 31 January 2018:**
- Appearing for the 1<sup>st</sup> Petitioner.
  - Challenging the declaration of the 3<sup>rd</sup> Respondent as Senator, Wajir County.
  - Election of the 3<sup>rd</sup> Respondent (Senator, Wajir County) upheld.
- (s) ***Hassan Noor Hassan v The Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2018] eKLR, HC (Nairobi), Election Pet No 1 of 2017, (F A Ochieng, J):**
- Appearing for the Petitioner.
  - Challenging the declaration of the 3<sup>rd</sup> Respondent as County Governor, Mandera County.
  - Election of the 3<sup>rd</sup> Respondent (County Governor, Mandera County) upheld.
- (t) ***Harun Meitamei Lempaka v Lemanken Aramat & 2 others* [2013] eKLR, CoA (Nairobi), Election Pet Appeal No 276 of 2013, (Waki, Musinga and Gatembu, JJA), judgment dated 28 March 2014 (being an appeal from the High Court of Kenya at Nakuru in Election Pet No 2 of 2013):**
- Challenging the High Court's decision in upholding the election results for the Member of the National Assembly, Narok East Constituency.
  - Appeal dismissed.

- (u) ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR, SCoK (Nairobi), Pet No 5 of 2014** (Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki Ndungu, SCJJ), judgment dated 6 August 2014 (being an appeal from the judgment and decree of the Court of Appeal at Nairobi in Court of Appeal Election Pet No 276 of 2013):
- Appearing for the Appellant.
  - Challenging the Court of Appeal's decision in setting aside the trial court's judgment and ordering for recount, thus invalidating the election results.
  - Appeal allowed.

## **6 Conclusion**

This paper has considered the various EDR mechanisms put in place in Kenya to resolve pre-election and post-election disputes. The paper has considered the legal framework and principles that underlie the electoral system in Kenya and the parameters and tools for managing team dynamics in election petitions as pertains to the litigation of electoral disputes.



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