



WHY IS THE JUDICIARY NOT A LUCRATIVE OPTION?



Photo by Alex Kamweru

The position of the judiciary is complicated by the fact that all judicial officers in the High Court and the Court of Appeal who hear Election Petitions are, under the Constitution of Kenya, appointees of the President.

By an Advocate of the High court of Kenya

The legal channel of challenging an electoral result in Kenya is prescribed in the Constitution as well as in an Act of Parliament, the National Assembly & Presidential Elections Act. The Constitution states that a party dissatisfied with the result of any election may do so by filing a Petition in the High Court seeking nullification of the result declared by the ECK in any given poll.

Upon the filing of the petition, required to be done within 28 days of the publication of the results of the Election in the Kenya Gazette, the aggrieved

party would then have to wait for the Petition to be heard by the Court. This time limit would give the impression that the law is keen to ensure that petitions are filed, heard and determined with due speed. However, the experience is altogether different; for instance, it is common knowledge that a number of Election Petitions filed after the 2002 General Elections were yet to be determined by the time the National Assembly was dissolved for the 2007 General Elections. This means that some Parliamentarians served their full terms of office for the Session 2003-2007 notwithstanding the fact that

petitions were pending against them. The petitioners, on the other hand, found out that their intent to vindicate their rights to fair elections were frustrated in the sense that, the desired outcome of a determination by the Court of who was the right person to represent the particular

...the seeming failure by ECK...is a failure of the institution rather than the absence of ...the law.

Why the Judiciary is not a Lucrative Option

constituency for the term 2003-2007 was defeated by the lapse of the parliamentary term before the Court could determine that issue definitively.

Going by this, it is therefore possible that persons who presented petitions did not get the justice they sought from the Courts, and that the electors in these constituencies were effectively disenfranchised throughout the period. The absence of a specific time-frame for determining election petitions would appear to negate the need to institute them since the terms of electoral Office of the Presidency and National Assembly are in themselves limited to five years. Unfortunately, therefore, a petition that is not heard within the 5 year term erodes the practical utility and attraction of the petition as a means to resolve electoral disputes for a party seeking a quick resolution-notwithstanding the fact that it is the only legal means of doing so.

In addition to the foregoing, the position of the judiciary is complicated by the fact that all Judicial Officers in the High Court and the Court of Appeal (who hear Election Petitions) are, under the Constitution of Kenya, appointees of the President. It has been argued that the reluctance to seek judicial intervention is partly borne out of this fact for the reason that, the President is in a situation of patronage with regard to the Judicial Officers either in their appointments, and or even their promotion such as from the High Court to the Court of Appeal. This link of patronage would make it unlikely that a judicial Officer would preside over a dispute involving his appointing authority without fear or favour, in spite of his or her judicial oath.

Secondly, in view of the fact that the Presidents oath is required, as a matter of law, to be sworn before and administered by the Chief Justice adds to these fears of impartiality. Observing as mentioned above that the Chief Justice may himself have been a direct appointee of the President.

Thirdly, by administering the oath to a President, the impression given is that the Chief Justice is himself satisfied that the process was

valid. It would, therefore, lie ill for any other Judicial Officer, all being subordinates to the Chief Justice, to then rule in favour of a petitioner against the Presidents election as this would carry with it an implication that the oath was improperly administered. It in effect puts the judge deciding on a petition in the unenviable situation in which he or she has to impugn the action of his superior- the Chief Justice.

A fourth possible reason for reluctance is the fact of the poor record of the judiciary in resolving petitions challenging the election of a sitting President. Although Kenya has had just three contested Presidential Elections, that is in the years 1992, 1997, and 2007, Presidential Election Petitions were filed against the candidate

declared winner after the elections of the years 1992 and 1997. In the challenge of the declared result for the election held in the year 1997, the Court held that the fact that the petitioner had not served the petition to the declared winner in person rendered the whole petition incompetent and nugatory. This decision was made in spite of attempts by the petitioner to explain the difficulties of accessing a sitting president in person for the purposes of effecting service of the petition. This decision was subsequently upheld by the Court of Appeal in the 1999 and dismissed without a hearing on the factual merits. Although the position has since been changed by an amendment to the law and strict personal service of a petition is no longer necessary, the lesson to be drawn here is that challenging the election of an incumbent President is bound to meet arduous legal obstacles within the Courts.

We therefore recommend;

- ü The Presidential Elections timing as stated in the Constitution needs to be amended to provide specific election calendar.
- ü The appointment of the members of the Electoral Commission should be a shared responsibility between the respective arms of Government.

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Was the ECK right in Declaring Disputed Results?

THE ANNOUNCEMENT of the disputed results of the Presidential Elections by the Electoral Commission of Kenya (ECK) on 30th December, 2007, led to the eruption of a series of protests and violent reactions in many parts of Kenya. The protests and violent reactions were based upon the supposed argument that the results as declared by the ECK were tainted by the irregularities and electoral malpractices in vote counting and tallying.

Questions have been asked whether the situation may have been avoided in light of the contention by the ECK that its hands were tied by the Law to declare the results notwithstanding credible doubts as to the authenticity of the electoral counting and vote-tallying process. ECK has urged any dissatisfied parties to challenge the results through the judicial process.

On that view, it has been argued that the political disturbances and breakdown in law and order that erupted in Kenya were the result of the fact that the Electoral Commission of Kenya (ECK) was operating within a legal environment that is tattered and prone to abuse.

The argument goes ahead to posit that had there been a better constitutional framework and electoral laws, the crisis would probably have been averted. Without necessarily entering that into an examination as to the extent to which the foregoing premises are true, this paper shall examine the laws from an electoral and Constitutional perspective to determine the extent to which these may have occasioned the crisis, if at all.

Firstly, the Law that governs elections, generally, that is, elections in respect of the Presidency and the National Assembly in Kenya is spread out between the Constitution and the National Assembly and Presidential Elections Act.

It is necessary to state that ECK is established as such by the Constitution which also spells out its prime purposes. These Purposes are generally the registration of voters and main-

tenance of voter registers; the direction and supervision of the respective Presidential, National Assembly and Local Government elections; the promotion of free and fair elections and promotion of voter education, among others.

In the context of the disputes surrounding the Presidential Elections of December, 2007, the second and third responsibilities of the ECK need deeper focus. In furtherance of its duty to supervise and direct elections as read together with that of ensuring free and

fair elections, it can be argued that the Constitution has mandated the ECK with the far-reaching and grave responsibility that goes beyond conducting the Elections as a formality. That is, the ECK should not simply conduct the Electoral exercise

but should also guarantee its quality in terms of a free and fair outcome. This is a responsibility placed upon ECK by the Constitution and one which, therefore, ECK is mandated to assure in the course of fulfilling its other mandates. Therefore, ECK does not only have the obligation to conduct the Elections, it has a responsibility to ensure that the outcome of any elections must satisfy the free and fair condition of its responsibility.

In that sense, therefore, the announcement of the disputed results of the Presidential Elections by the Electoral Commission of Kenya (ECK) led to the eruption of a series of protests and violent reactions in many parts of Kenya. The protests and violent reactions were based upon the supposed argument that the results as declared by the ECK were tainted by the irregularities and electoral malpractices in vote counting and tallying.

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THE LOCAL GOVERNMENT ACT NEEDS AN OVERHAUL

By Laban Nyaosi Osoro (LLB, Dip. KSL)

THE ONLY SILVER LINING to the crisis that engulfed our country after the 2007 general election is perhaps the unique opportunity it presents to get comprehensive reforms to our constitution, key institutions and their constitutive statutes.

But there are areas in our statutory frameworks the momentum may not reach, yet these statutes form the supporting pillars of good governance. The new phenomena of sharing power when there is no clear winner is not, and should not, be confused with a triumph of democracy, it is rather the last resort to save a country that is on the fast lane to anarchy!

The manner in which the Nairobi Mayoral candidates settled their election dispute when they were confronted with a tie is a clear sign of systems and institutions that don't work. We now have a country that is creating dangerous precedents, that you can be rigged out and nothing happens, because you are not the first one anyway, or that you may well be defeated in an election and claim that your vic-

tory was stolen, decline to concede defeat, and refuse to approach proper redress mechanism. Against this backdrop is the need for soul searching within our institutional frameworks with a view to identify weak links that are threatening to break structures of governance and tear apart our national fabric.

The Act

The Local Government Act was passed in 1977. The Act spells out wide ranging powers and functions for Local Authorities that relate to provision of public services, promotion of good governance and stimulation of good economic growth. To date we have about 175 local authorities including 67 county councils and three cities forming the local government.

Since 1977 the Act has undergone several piecemeal amendments aimed at increasing its efficiency in delivery of services to citizens. But these amendments have not been able to match the growing rural urban migration and as such they have made little impact

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The Local Government Act Needs an Overhaul

on the ground. The amendments have also been made in isolation or intransigent of other statutes that interact closely with the Local Government Act namely; the Local Government Loan Authority Act (Cap 270), Land Planning Act Cap 303, and Trade Licensing Act (Cap 479) Rating Act (cap 267) Valuation Act for Rating Act (Cap 255) and Agriculture Act (Cap 218).

Too much power for the Minister

The biggest undoing and disservice of the Act is that though the local authorities enjoy relative autonomy in their jurisdictions, the Minister for Local Government is the all-powerful administrator of the Act. The enormous powers that the minister wield under section 8 of the statute in, naming and altering names of towns and counties are unwarranted in a modern democracy. These should instead be bestowed upon an institution or committee with a certain level of professional expertise rather than the minister.

The manner in which the Nairobi Mayoral candidates settled their election dispute when they were confronted with a tie is a clear signs of systems and institutions that dont work

Whereas section 5 and 6 requires that the minister consults with the electoral commission in establishment of an area or ceasing to be a municipality, county or township, define, alter, merge or transfer parts of these administrative units, the powers under section 8 are not subject to consultation. To wit this point, we have in the recent past seen the minister abuse his executive powers of nominations and revocation of nominations of councilors, the case of Taibu v. Minister of Local Government and 4 others (2007)eKLR is illustrative where the court has frowned over the capricious exercise of these powers.

There is a disconnect between the powers exercised by the mayor, the town clerk and the minister, perhaps it is time we moved out from ceremonial to executive mayors that are elected by the people and answerable to the people. That a town clerk can purport to have power to lock out a mayor from accessing his office is ridiculous as echoed by the court *In John M. Nyaga v Town Clerk, Municipality of*

Embu & another [2007] eKLR. The two cases above is a statement to the effect that there is an urgent need to re-look at the power relations between these three offices to ensure harmony and efficiency.

Near-comical election provisions

Section 13 of the act which seeks to provide qualifications of a mayor in essence simply provides that the candidate must be selected from among councilors, these allows any councilor nominated or elected to be eligible. The offshoot has been electing mayors who may not have the trust of the people, but merely persons able to lobby and bribe other councilors, Worse still, even the nominated councilors, who may have been nominated without proper vetting by parties or the minister are eligible. This provision should outline more specific credentials of eligibility in relation to the duties of a mayor. It should include ones academic qualification as a custodian and manager of the larger public interest.

The most derider of all provision that interests one in the Local Government Act is Section 14(3) which provides that incase of a tie in a mayoral election, *'the election shall be determined by lot between the candidates'*. This provision can be a source of discord and heightened tension in a hotly contested election. Ordinarily the statute should have provided for a second round of voting to see if there can be a clear winner as the case in parliamentary election. This will provide a fresh opportunity to the electorate to reconsider their choice, as opposed to a situation where the election of a mayor is left to chance.

This recent exercise has brought to the fore once again critical questions over the powers of the minister in nominating councilors. Especially the actions or omissions to withhold and even alter the names forwarded to the ministry to be gazetted. In my opinion, I totally agree with the minister's new yardstick to lock out those who have vested interest or potential conflict of interest in public offices

The Local Government Act Needs an Overhaul

that they aspire to hold. However, this expression should find its way into our National Assembly and Presidential Elections Act. This would get rid of so many politicians who are struggling to keep afloat through court cases against public institutions they have previously ransacked behind their corporate veils. Nevertheless, until that is done, the ministers' actions and omissions remain whimsical exercise of public authority. The Minister although bound to act in consultation with the Electoral Commission in the nominations, he chooses to inform the electoral body the reason for his actions.

The powers of the minister in determining the number of councilors under section 26 (b) are unfettered and subject to abuse. The minister is given a free hand to nominate councilors not exceeding one-third of the number of elected councilors. Although the Act demands that these powers be exercised as provided in section 33 of the Constitution, the practice has been otherwise. These powers need to be exercised by a panel or the Electoral Commission with clearly specified terms and definitions of what government interest and any other special interest connotes.

Recommendations

- § Audit the Local Government Act and spruce it up to capture aspirations of a local government that all Kenyans want. The efforts made by the Kenyan Local Government Reforms Program (KLGRP) supported by the World Bank need to be fortified, reorganize and amalgamate all small non-viable authorities while decentralizing the decision making powers and balancing resource distribution.
- § Have a clear checks and balance system to effectively deal with the menace of councilors allocating themselves every available inch of land under their superintendence including public

grave graveyards (sic), the Nakuru Municipality recently confessed that it has no more space left in the public cemetery.

- § Amend the Act to guarantee access to that information. Although the Act provides public access to councils budget information, it does not guarantee it. Section 212 (8) only allows local authority to publish a summary of the approved budget in a local newspaper. The fact that copies can be availed to interested citizens upon payment restricts access to information to only a few people who can afford payment. To enhance accountability, information should be freely accessible to all citizens upon request.

§ Rationalize the overbearing powers of the minister and establish proper checks and balances within the system.

Reforms to the Act have previously been postponed in anticipation of a new constitution that was likely to reorganize governance structures. With the renewed vigour to deliver on these by the 10th Parliament, issues that have dogged the Local Authorities for so long should be addressed in the new constitutional dispensation and in the constitutive statutes. These reforms should envisage an increased local government capacity to provide services with sufficient resource base, strong management as well as technical and institutional capacity to increase service coverage to meet the ever expanding urban population. This will require foresight in planning and optimum efficiency within the local government.

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CORRUPTION NEWS WRAP

Uganda: Govt Wants 14 Years in Jail for Corruption

By Joyce Namutebi And Cyprian Musoke Kampala, New Vision (Kampala)

THE Government has tabled a stringent law to deal with corruption in both the public and private sector, with prison sentences of up to 14 years for embezzlement and causing financial loss.

The Anti-Corruption Bill 2008, tabled by State Minister for Ethics and Integrity Dr. James Nsaba Buturo on Thursday, also provides for the confiscation of property acquired as a result of corruption, while strengthening the offices of the Inspector General of Government (IGG) and the Director of Public Prosecutions (DPP).

Buturo explained that the Bills objective is to provide for "more effectual prevention of corruption in both the public and private sector, and special investigation powers to the Inspector General of Government and the Director of Public Prosecutions".

It further provides for the amendment of the Penal Code Act and the Leadership Code and the protection of informers.

Anybody found guilty of embezzlement is liable of conviction to a jail term of up to 14 years and/or a fine of up to Sh672m, according to the Bill. The Bill proposes the same

punishment for anybody convicted of causing financial loss.

The Bill states: "Any person employed by the Government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any *act* knowing or having reason to believe that the act or commission will cause financial loss... commits an offence."

Bribery of public officials, corrupt transactions with agents, diversion of public funds, influence peddling, sectarianism and nepotism will land those convicted to terms of imprisonment of up to 10 years and/or fines of up to Sh4.8m.

Abuse of office by a person employed in a public body or a company in which the Government has shares is an offence which on conviction carries imprisonment of up to seven years and/or a fine of up to Sh3.36m.

The Bill gives powers to the IGG and the DPP to investigate or cause investigation of people where there are reasonable grounds to suspect that they maintain a standard of living above their known sources of income or assets.



Ex-PM Thaksin faces new Thailand graft charge

BANGKOK (Reuters) - Thai graftbusters filed new corruption charges against former Prime Minister Thaksin Shinawatra on Monday, accusing him and other top officials of illegal use of funds from a state lottery. The Asset Scrutiny Committee, appointed by the generals who ousted Thaksin in a bloodless 2006 coup, also charged Thaksin, 46 cabinet ministers and other top officials for wrongly approving and operating the lottery from 2003 to 2006.

The charges were filed at the Supreme Court which can take up to 45 days to decide whether it will hear the case, ASC lawyer Sitichoke Sichaoren told reporters.

If the court accepted the case, Finance Minister Surapong Suebwonglee and two junior ministers, three of the 47 named in the graft charge, would be required by law to step aside

while the trial is conducted, an ASC spokesman said.

The ASC asked the court to order Thaksin and some other ministers to pay 15 billion baht (234, 667 pounds) in compensation to the state, Sitichoke said.

Thaksin, who returned to Thailand last month and insists his political career is over, denied any wrongdoing. "I am not worried. I did nothing wrong," Thaksin told reporters.

After his ouster, Thaksin was accused by the coupmakers of presiding over rampant corruption during his five years in power. But he and his family have faced few formal charges.

Thaksin will appear in court on Wednesday to face corruption charges related to his wife's purchase of a prime piece of land in Bangkok from the Bank of Thailand.

LET'S FIGHT CORRUPTION, NOT THE COUNTRY

**Over 300,000 Displaced
Evict Corruption Not Kenyans**



Tuangamize Ufisadi, Siyo Taifa



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**WHAT TRIBE ARE THEY?
Ethnic Politics Fuels Corruption**



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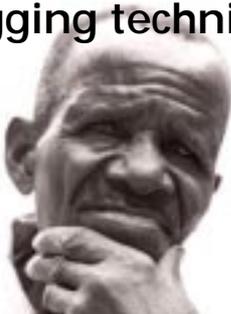


Up Coming Events

22 March 2008: World Water Day
Organiser: IRC International Water and Sanitation Centre
Location/Address: IRC International Water and Sanitation Centre
 The Netherlands

21- 24 April 2008: Conference on 'White collar fraud and corruption'
Organiser: IIR
Location: Crowne Plaza Brussels, Belgium
Contact: kmregistration@informa.com

For up-to-date information on election information, anti-rigging techniques and discussions



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