



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NUMBER OF 127 OF 2017

BETWEEN

DR. KENNETH OTIENO.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC)INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner herein is a citizen of Kenya and registered voter. He is also the Chairman of the International Policy Group, a non-governmental organization registered under the laws of Kenya. He has lodged the present petition against the Respondent, the principal legal advisor to the National Government, alleging that recent amendments to the Elections Act contravene the Constitution.

2. The Interested Party (hereinafter IEBC) is a constitutional commission established under Article 88(1) of the Constitution of Kenya, and has the constitutional mandate of conducting and supervising referenda and elections to any elective body as prescribed by the Constitution.

3. In his Petition dated 31st March 2017, the Petitioner challenges sections 6, 6A, 8A and 44 of the Elections Act. He contends that the said provisions, which were amended or introduced by the Elections Laws (Amendment Act) No. 36 of 2016 which commenced on 4th October 2016, and which amended the Elections Act 2011, contained radical, irrational and impractical changes to the electoral process. He further alleges that the said provisions introduced timelines that are contrary to the constitutionally provided timelines set out under Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution.

4. The Petition was opposed by the Respondent and IEBC, and the Court directed the parties to file and exchange written submissions. The Petition was orally canvassed in court at a hearing held on 5th June 2017.

5. At the hearing of the Petition, the Petitioner's counsel informed the Court that the Petitioner had abandoned his challenge of section 6 of the Elections Act, and would only question the constitutionality of sections 6A, 8A and 44 of the Act.

The Petitioner's Case

6. The Petitioner's case was set out in the Petition dated and filed in Court on 31st March 2017 and his supporting affidavit sworn on the same date. The Petitioner's legal arguments in support of the Petition were contained in submissions and authorities dated and filed on 29th May 2017, and a supplementary digest of authorities filed on 5th June 2017.

7. The Petitioner is specifically concerned, first, with the provisions of section 6A(1) of the Elections Act, which gives to voters a period of thirty days within which to verify their biometric data, and provides that this should be done at their respective polling stations at least 60 days before the general elections.

8. It was contended that this requirement constitutes a stringent timeline which may obstruct a simple and transparent voting process as envisaged by the Constitution, considering the logistics needed to have Biometric Voter Registration (BVR) kits in approximately 44,000 polling stations within the country. Further, that the impugned timelines will affect the capability of IEBC to administer the 2017 general election on 8th August 2017.

9. The Petitioner further contended that section 6A(1) of the Act is unconstitutional and contravenes Article 38(3), 82(2) and 83(3) of the Constitution as the requirement to verify biometric data may limit the rights of members of the public as well as persons with disabilities who may not or cannot travel to their respective polling stations for the verification. Further, that the said section fails to recognize persons who do not have fingerprints or those whose fingerprints have been distorted by the nature of the work they do.

10. The Petitioner also alleges that the provision in section 6A(3)(b) requiring the online publication of the register of voters is unconstitutional and contravenes Articles 83(3) and 38(3) of the Constitution as it fails to take into account the rural population that cannot access internet and computers. Further, that the regulations envisaged by the aforesaid section may not be out in a timely manner thereby locking out persons who may not be aware of other modes to verify their details. This contention, however, was not addressed by the petitioner at the hearing.

11. As regards section 8A of the Act, the Petitioner alleges that it is impractical for IEBC to implement section 8A(3) of the Act which requires it to engage a reputable firm to conduct an audit of the registers of voters within 30 days of the coming into force of the aforesaid section. The Petitioner avers that the timeline set out under section 8A(3) does not take into account the tendering process of a public entity as stipulated by sections 96-98 of the Public Procurement and Asset Disposal Act, and contravenes Article 88(5) and 201(d) of the Constitution.

12. According to the Petitioner, IEBC may appoint an audit firm in a manner that is not transparent or competitive due to the stringent timelines. Further, that the money allocated for the procurement of the audit firm may not be used in a strict and responsible way since the process stipulated under Part IX of the Public Procurement and Asset Disposal Act cannot be met with the stringent timelines.

13. It is the Petitioner's submission that the timeline provided under section 8A(3) is arbitrary and does not conform to Article 227 of the Constitution which enjoins public entities to contract goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

14. The Petitioner referred to section 5(1) of the Public Procurement and Asset Disposal Act (PPADA) which provides that where there is inconsistency between the PPADA and any other legislation in matters relating to procurement and asset disposal, PPADA shall prevail except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

15. It is the Petitioner's contention that the timeline set by section 8A(3) of the Elections Act is in conflict with the timelines set by the PPADA in respect to invitation, opening and evaluation of tenders and therefore, that it is impossible for IEBC to observe the timelines set out therein. The Petitioner argued that pursuant to the decision in Misc. App. 648 of 2016 Republic vs. Independent Electoral and Boundaries Commission ex-parte Coalition for Reforms and Democracy, IEBC was only able to conclude the procurement process and enter into the agreement envisaged under section 8A (3) of the Elections Act on 31st March 2017.

16. The Petitioner further argued that the usage of technology to the exclusion of any other process introduced by section 44 of the Elections Act, is without regard to the imperatives of Article 81(e) of the Constitution which provides for the principles of a free and fair election. In addition, that under section 44(4) of the Elections Act, IEBC is required to test, verify and deploy the electronic electoral system at least sixty days before the general election. The Petitioner also made reference to section 44(7) which requires that the technology that is to be used during elections has to be procured at least 120 days before the general election.

17. It is his contention therefore that to his understanding, during the last ninety days before the general election, IEBC is required to open the register of voters for inspection under section 6(2) of the Elections Act; open the register of voters for verification of biometric data under section 6A(2); implement the recommendations of the audit report under section 8A (6); test, verify and deploy an integrated electronic electoral system as required under section 44(4) (b); and procure the technology to be used during the general election under section 44(7) (b) of the Elections Act.

18. Lastly, the Petitioner challenges the establishment of a technical committee to oversee the adoption of technology by IEBC under section 44(8) of the Elections Act, and avers that the said section contravenes Articles 81 and 88 of the Constitution. According to the Petitioner, the establishment of the technical committee, which will supervise the conduct of elections, contravenes Article 88(1) and (4) of the Constitution which vests the conduct of elections solely on IEBC. The court was in this regard referred to the case of in Re Matter of the Interim Independent Electoral Commission (2011) eKLR where the independence of commissions and independent offices established under the Constitution was underscored.

19. It was also contended, that the establishment of the technical committee is likely to cause antagonism and rifts in IEBC, which is required to administer elections in an efficient, neutral and accountable manner. It is also the Petitioner's contention with respect to the composition of the technical committee, that section 44(8) of the Act does not indicate what constitutes relevant agencies, institutions or stakeholders. Further, that since political parties have previously been considered as stakeholders by previous commissions, they are likely to be in the technical committee, which would be in breach of Article 81(e)(ii) to (v) of the Constitution, as they are interested parties in the electoral process.

20. Counsel for the Petitioner submitted that the technical committee established under section 44(8) of the Elections Act was likely to influence or interfere with the independence of IEBC as enshrined in the Constitution. The Petitioner relied on the case of Michael Sistu Mwaura & 12 others vs. Ethic & Anti-corruption Commission & 4 others (2016) eKLR where the independence of constitutional commissions was considered. The Petitioner argued that Parliament was under a constitutional obligation not to pass

legislation that undermines the independence of IEBC, and the Court was urged to declare section 44(8) of the Elections Act unconstitutional and void.

21. In his submissions, Mr. Kiragu Kimani, the Petitioner's learned counsel, identified two issues for determination, namely: - whether the timelines set for verification of biometric data, audit of the register of voters and establishing an electronic electoral system are unconstitutional; and secondly, whether the establishment of the technical committee under section 44(8) of the Elections Act was unconstitutional.

22. Learned Counsel submitted that the principles to be applied when interpreting the Constitution are provided for under Article 259 of the Constitution which is couched in mandatory terms. Counsel also cited the case of Council of County Governors vs. Attorney General & another (2017) eKLR where the court considered the principles to be followed in determining whether an impugned statutory provision is unconstitutional or not.

23. Reliance was also placed on the decision in Geoffrey Andare vs. Attorney General & 2 others (2016) eKLR, where the court adopted the decision of the Supreme Court of Canada in R vs Big M Drug Mart Ltd., (1985) 1 S.C.R. 295 that held that both purpose and effect of legislation are relevant in determining constitutionality and further, that either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

24. According to the Petitioner, the timelines set out in sections 6A, 8A and 44 of the Elections Act have an unconstitutional effect. They are, in his view, aimed at preventing the IEBC from fulfilling its mandate to conduct, manage and supervise the general election. Counsel urged the court to intervene to protect the independence of IEBC and ensure fidelity to the will of the people of Kenya as expressed in the Constitution.

25. It was further submitted on behalf of the Petitioner that under Articles 101(1), 136(2), 177(1)(a) and 180(1), the election of Members of Parliament, the President, Members of County Assemblies and Governors is scheduled to take place on the second Tuesday in August of every fifth year. Counsel argued that anything that places the date of the general election at risk is against the will of the people as set out in the Constitution, and the Court has a duty to intervene and stop any attempts to depart from the will of the people.

26. In further submission, the Petitioner contended that IEBC is an independent commission under Article 249(2) which is subject only to the Constitution and the law, and not to direction or control by any person or authority. The court was referred to the case of Kenya Association of Stock Brokers and Investment Banks vs. Attorney General & Another (2015) eKLR in which the Court cited the Supreme Court decision In Re Matter of the Interim Independent Electoral Commission (2011) eKLR where it was held that the spirit of the Constitution must preside over and permeate the process of judicial discretion and interpretation.

27. The Petitioner argued that under Article 82(2) of the Constitution, the legislation enacted by Parliament for the conduct of elections and referenda must be simple, transparent and must take into account the special needs of persons with disabilities and other persons or groups with special needs.

28. In conclusion, the Petitioner argued that IEBC was unlikely to be able to comply with the aforesaid statutory requirements within such a short period of time before the general election. The Petitioner submitted that the effect of the timelines set by Parliament in the Amendment Act was to make it impossible for IEBC to fulfil its mandate under Article 88 of the Constitution.

29. It was argued, that by dictating when certain actions have to be undertaken, the timelines interfered with the independence of IEBC as guaranteed under Article 249 of the Constitution contrary to the decision In Re The Matter of the Interim Independent Electoral Commission and Michael Sistu Mwaura & 12 others vs. Ethic & Anti-corruption Commission & 4 others (2016) eKLR

30. The Petitioner therefore asked the Court to allow the Petition and grant the following prayers:-

I.(withdrawn).

II. A declaration be issued declaring the timelines set out in section 6A of the Elections Act, 2011 the Independent Electoral and Boundaries Commission to open the register of voters for verification of biometric data unconstitutional, unlawful and void in so far as they set timelines for the Independent Electoral and Boundaries Commission to discharge its mandate contrary to the constitutionally provided timelines set out under Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution.

III. A declaration be issued declaring the timelines set out in section 8A of the Elections Act, 200 for the audit of the register of voters unconstitutional, unlawful and void in so far as they set timelines for the Independent Electoral and Boundaries Commission to discharge its mandate that are contrary to constitutionally provided timelines set out under Articles 101(1), 136(2),177(1)(a) and 180(1) of the Constitution.

IV. A declaration be issued declaring the timelines set out in section 44 of the Elections Act, 2011 to establish an electronic electoral system and unconstitutional, unlawful and void in so far as they set timelines for the Independent Electoral and Boundaries Commission to discharge its mandate that are contrary to constitutionally provided timelines set out under Articles 101(1), 136(2),177(1)(a) and 180(1) of the Constitution.

V. A declaration be issued declaring section 44(8) of the Elections Act, 2011 that provides for the establishment of a technical committee to oversee the adoption of technology in the electoral process unconstitutional, unlawful and void in so far as it establishes a technical committee to oversee and implement the use of technology in the electoral process contrary to Article 88 and 249(2) of the Constitution.

VI. Such other orders as the court shall deem fit and just to grant.

The Respondent's Case

31. The Respondent opposed the Petition through Grounds of Opposition dated 17th May 2017, and submissions and supplementary submissions dated 31st May 2017 and 2nd June 2017 respectively. The Respondent stated that if granted, the prayers set out in the Petition would undermine the constitutional principles set out under Article 81(e) and 86 of the Constitution in ensuring free and fair elections.

32. The Respondent further contended that the Petition is speculative and only raises hypothetical questions. In his view, the burden of proving any alleged unconstitutionality in respect to the Elections Act lies with the Petitioner, and the Petitioner had failed to demonstrate how the impugned provisions of the Elections Act were unconstitutional to warrant the grant of the orders sought. Further, that the Petition was frivolous in that the orders sought seek to stop the IEBC from executing its constitutional mandate.

33. In his submissions on behalf of the Respondent, learned State Counsel, Mr. Rogers Sekwe, argued

that the issues for determination were whether the impugned sections, 6A, 8A and 44 of the Elections Act, violated the Constitution, and whether the Petitioner was entitled to the reliefs sought.

34. With respect to whether the aforementioned provisions of the Elections Act violated the Constitution, Counsel argued that under Article 259 of the Constitution, the Constitution should be interpreted in a manner that promotes its purposes, values and principles, and further that Article 159(2)(e) enjoins the court to protect the purposes and principles of the Constitution.

35. The Respondent referred the Court to the case of Njoya & 6 others vs. Attorney General and Another, Misc. Civil Application No. 82 of 2004 where it was stated that the Constitution must be construed broadly, liberally and purposively to give effect to its values and principles. Further reliance was placed on Tinyefuza vs. Attorney General of Uganda Constitutional Petition 1 of 1997 (1997 UGCC 3) where it was held that the Constitution must be read as an integrated whole, without any provision destroying the other but each sustaining the other.

36. The Respondent also relied on the case of Ndyababo vs. Attorney General (2001) EA 495 to submit that the general presumption is that an act of Parliament is constitutional, and the burden of proving the contrary lies with the person alleging otherwise.

37. It is the Respondent's submission that when determining whether a statute violates the Constitution, the intention of the legislature must first be considered as was held in the cases of Malindi Law Society vs. Attorney General & 4 others (2016) eKLR, County Government of Nyeri & Another vs. Cecilia Wangechi Ndung'u (2015)eKLR and Cusack vs. Harrow London Borough Council(2013) 4 AllER 97. The Respondent further relied on the cases of Mugambi Manyara & another vs. Attorney General & 5 Others (2017)eKLR and Geoffrey Andare vs. Attorney General & 2 Others(2016)eKLR for the proposition that in determining the constitutionality of a statute, the object and purpose of the legislation must be considered.

38. As to whether the Petitioner was entitled to the prayers sought, the Respondent argued that the impugned provisions of the Elections Act were constitutional, and that the Petitioner had not demonstrated how the timelines in section 6A overlapped with other provisions. Counsel submitted that section 104 of the Elections Act provided for facilitation of persons with special needs including persons with disabilities.

39. It was also submitted that section 8A(3) which required IEBC to appoint a reputable firm to conduct an audit of the register within 30 days of the coming into force of the Act complemented and enforced constitutional principles of free and fair elections provided for under Articles 81 and 86 of the Constitution.

40. The Respondent contended that there was no evidence of actual breach of the Constitution, and that the court was being asked to engage in an academic exercise. While relying on the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012 (2013) eKLR, the Respondent stated that the Petitioner had not demonstrated the existence of any concrete facts or real experience to warrant an interpretation of the statutory provisions against those facts.

41. With regard to the contentions that section 44(8) of the Elections Act was unconstitutional, the Respondent argues that under the provision, the composition of the members of the technical committee was left to the discretion of IEBC, and such discretion enhances its independence. Counsel argued that IEBC could choose to only appoint members drawn from itself and therefore, that the Act does not dictate or direct IEBC to appoint members of the technical committee from a particular agency, institution

or stakeholders.

42. The Respondent further argued that there was no evidence that IEBC violated Article 227 of the Constitution and section 97 to 99 of the PPADA in awarding the tender for the audit of the voter register. The Respondent contended that the issue raised by the Petitioner challenging the award of the tender to KPMG to conduct an audit on the voters register was extensively dealt with and determined in *Mugambi Imanyara & another vs. Attorney General & 5 others* Petition no. 339 of 2016, (2017)eKLR . According to the Respondent, the mere fact that the tender was awarded within a strict timelines did not amount to breach of the Constitution and laws relating to public procurement.

43. Lastly, the Respondent submitted that the amendments are intended to implement the provisions of the Constitution, and enable IEBC to conduct free, fair and democratic elections.

The Case of IEBC

44. IEBC filed a statement of grounds dated 15th May 2017 and submissions dated 2nd June 2017. It was contended therein that the Petition raised fundamental questions of law touching on the constitutionality of national legislation directly relating to its role in the electoral process. IEBC urged the Court to urgently adjudicate on the issues raised by the Petition in order to offer certainty on the applicable laws governing the electoral process with respect to general elections due on 8th August 2017.

45. Mr. Paul Nyamodi, the Learned Counsel for IEBC, submitted that the issue for determination was whether the amendments introducing the impugned sections of the Elections Act meet the constitutional threshold. Counsel stated that the effect of the impugned amendments on its independence, as well as the practicability of its compliance with the strict timelines and time constraints set therein prior to the August 2017 elections, were up for determination.

46. Reference was made to Article 2 of the Constitution and the case of *Marbury vs. Madison*, 5 US 137(1803) for the submission that being the supreme law, the Constitution overrides any law that is contrary to it. Reliance was also placed on the cases of *Amax Potash Ltd vs. Government of Saskatchewan* (1977) 2SCR 576, *Doctors for Life International vs. Speaker of the National Assembly and others* (CCT 12/05)(2006)ZACC 11, *US vs. Butler* 297 U.S 1(1936) and *Speaker of the Senate & another vs. Attorney General & 4 others*(2013)eKLR where the gist of the Court's finding was that courts are under a duty to ascertain and declare whether legislation conforms to the Constitution.

47. Counsel urged the Court to interpret the Constitution in a manner that reflects the values and aspirations of the people of Kenya as well as the huge expectation placed on IEBC to act independently and to conduct free and fair polls. The Court was called upon to adopt a holistic approach to interpretation with a view to protecting and promoting the purpose, effect, intent and principles of the Constitution.

48. While asserting its independence under Article 249 of the Constitution, and as asserted by the Supreme Court decision in *In Re The matter of the Interim Independent Electoral Commission* (2011) eKLR, IEBC submitted that it was only subject to the Constitution under Article 249(2). The Court was thus urged to bear in mind the independence of IEBC in its interpretation of sections 44(5) and (8) of the Elections Act vis-a-vis the Constitution, and to guard and veto any attempt to erode that independence.

49. Lastly, IEBC submitted that the Court has a duty to test the constitutionality of the subject provisions of the Elections Act and make a declaration that would preserve the supremacy of the Constitution and

buttress its independence underpinned in the Constitution.

Analysis and Determination

50. We have considered the pleadings and submissions of the parties as well as the authorities relied on. We have also considered the issues proposed by the parties as falling for determination in this matter. In our view there is only one issue for determination viz: whether the impugned sections of the Elections Act, 6A, 8A and 44, are unconstitutional.

51. Article 259 of the Constitution enjoins this Court to interpret the Constitution in a manner that promotes its purpose and principles that advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. Further, we are mindful of the principle of law that there is a rebuttable presumption as held in *Ndyanabo vs. Attorney General* (2001) EA 495 that an act of Parliament is constitutional, and the burden of proving the contrary lies with the person alleging otherwise.

52. We have also considered the principles which guide a court in determining whether sections of an Act of Parliament are unconstitutional. These principles were succinctly laid out in the case of *Institute of Social Accountability & Another vs. National Assembly & 4 others* High Court Petition No. 71 of 2014 (2015) eKLR, as follows:-

“56. First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.

57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see *Ndyanabo v Attorney General of Tanzania* [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.

58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others* Nairobi Petition No. 3 of 2011 [2011]eKLR, *Samuel G. Momanyi v Attorney General and Another* (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.

53. The Court went on to cite the decision of the Canadian Supreme Court in *R v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 in which the Supreme Court enunciated this principle as follows:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.”

54. The Court then proceeded to state as follows:

“59.the Constitution should be given a purposive, liberal interpretation. The Supreme Court in *Re The Matter of the Interim Independent Electoral Commission Constitutional Application* (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of *State v Acheson* 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

60. Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see *Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997* (1997 UGCC 3)).”

55. See also *Mugambi Imanyara & another vs. Attorney General & 5 others High Court Petition No. 399 of 2016* (2017) eKLR and *Coalition for Reform and Democracy (CORD) & 2 others vs. Republic of Kenya & 10 others Petition No.628 of 2014 consolidated with Petitions No.630 of 2014 and Petition No.12 of 2015* (2015) eKLR.

56. Before embarking on an analysis of the specific provisions of the Elections Act that are impugned in this Petition, we consider it useful to briefly set out our understanding of the Petitioner’s concerns with regard to the timelines set in the impugned sections. This is because at the core of the Petitioner’s case is his interpretation of the law as giving to the IEBC a very limited time period within which to undertake a host of activities connected with the elections. In doing so, we can do no better than quote the Petitioner’s submissions on the said timelines in paragraph 69 of his submissions:

“The effect of the aforementioned is that during the last ninety days before the general election, IEBC is required to do the following:

- a) Open the Register of Voters for inspection pursuant to section 6(2) of the Act.
- b) Open the Register of Voters for verification of biometric data under section 6A(2) of the Act.
- c) Implement the recommendations of the audit report as required under section 8A (6) of the Act.
- d) Test, verify and deploy an integrated electronic electoral system as required under section 44(4) (b) of the Act.
- e) Procure the technology to be used during the general election under section 44(7) (b) of the Act.”

57. The contested provisions of the Elections Act which set timelines are section 6A(1), 8A(3), 44(4) and 44(7). Section 6A(1) sets the timelines for the verification of biometric data and provides as follows:

“The Commission shall, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.”

58. Section 8A(3) sets the timelines for the audit of the voter register upon coming into effect of the said section on the 4th of October 2016, in the following terms:

“For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of —

- (a) verifying the accuracy of the Register;
- (b) recommending mechanisms of enhancing the accuracy of the Register; and
- (c) updating the register.”

59. Section 44 provides for the establishment of an integrated electronic electoral system and sets timelines for its procurement, testing and deployment in section 44(4) and 44(7) as follows:

(1) “Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2)

(3).....

(4) The Commission shall, in an open and transparent manner —

(a) procure and put in place the technology necessary for the conduct of a general election at least one hundred and twenty days before such elections; and

(b) test, verify and deploy such technology at least sixty days before a general election.

(5)

(6).....

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

(a) be restricted to the process of voter registration, identification of voters and results transmission; and

(b) be procured at least one hundred and twenty days before the general election....”

Whether section 6A(1) of the Elections Act 2011 is unconstitutional

60. The Petitioner alleges that section 6A (1) of the Elections Act contravenes Articles 38(3), 82(2) and 83(3) of the Constitution. Article 38(3) of the Constitution provides as follows:

“38. (3) Every adult citizen has the right, without unreasonable restrictions:-

- (a) to be registered as a voter;
- (b) to vote by secret ballot in any election or referendum; and
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member

and, if elected, to hold office.”

61. Article 82 (2) of the Constitution provides as follows:

“(2) Legislation required by clause (1) (d) shall ensure that voting at every election is—

(a) simple;

(b) transparent; and

(c) takes into account the special needs of—

(i) persons with disabilities; and

(ii) other persons or groups with special needs.”

62. Article 83(3) of the Constitution further provides as follows:

83. (3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

63. Our understanding of the Petitioner’s contention is that the stringent timelines under section 6A(1) of the Elections Act may obstruct a simple and transparent electoral process for reasons the time may not be adequate for the logistics needed, and may also limit the rights of citizens in rural areas or persons with disabilities.

64. In our view, there are two responses to the contention with respect to section 6A(1). First, while the section gives citizens the right to verify data within a period of 30 days, such period must be at least 60 days prior to the elections. What does the phrase “at least 60 days” imply? The Concise Oxford English Dictionary, 12th Edition defines the term “at least” to mean “not less than” or at “a minimum”. Therefore, this provision gives IEBC the option to start early enough, and allow sufficient time to put all the necessary logistical arrangements in place to ensure that all voters are able to verify their biometric data, as long as this is done not less than sixty days before the general election.

65. The section does not give any specific timeline to IEBC as to when the logistical arrangements should begin or end, and therefore in our view it is not in contravention of Articles 82(2) and 83(3) of the Constitution. The timeline that IEBC must observe, and on which it has no discretion is the 30 days it is required to give the voters to verify the biometric data.

66. The second response to the arguments against section 6A(1) relating to the violation of the rights of persons with disabilities is that first, the Petitioner has not demonstrated whether, and how, any persons with disabilities will be left out of the verification process, there being no factual situation placed before us that demonstrates that such verification is not possible. In addition, the IEBC is under an obligation, under section 104 of the Elections Act, to put in place a mechanism for facilitation of persons with disabilities in the exercise of their rights under Articles 38(3), 82(2) and 83(3) of the Constitution. We are unable to see how the provisions of section 6A(1) contravene these constitutional provisions.

Whether section 8A(3) of the Elections Act 2011 is unconstitutional

67. The Petitioner challenged section 8A(3) of the Act which required IEBC to procure a professional

reputable firm within 30 days of the coming into operation of the section, to audit the register of voters with the aim of verifying the accuracy of the register, recommending mechanisms for enhancing the accuracy of the register, and updating of the register. The firm was required under section 8A(4) to carry out that exercise and report to the commission within 30 days. IEBC was then to implement the recommendations within 30 days of receiving the report.

68. The Petitioner contended that the timeline provided for in section 8A(3) is arbitrary and did not take into account provisions of Article 227 of the Constitution. Article 227(1) of the Constitution provides that when a state organ or any other public entity contracts for goods and services, it should do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

69. From our reading of the section, the period allowed for carrying out these duties up to implementation of the report is ninety days. We understood the petitioner to say that the timeline of ninety days allowed to IEBC to fulfill this mandate is insufficient taking into account the procurement procedures and the parameters set under Article 227 of the Constitution. The Respondent did not share the Petitioner's concerns arguing that IEBC as a public entity, could procure the services without necessarily following procurement requirements provided for in PPADA.

70. It is not in dispute that IEBC is a public body set up under the Constitution, and like all public entities, it is bound by the provisions of PPADA when procuring goods and services. However, having considered the complaints by the Petitioner regarding section 8A(3), we are of the view that the issue is now moot.

71. The reason for this finding is that section 8A(3) was only meant to apply during the 2017 general election due on 8th August 2017. Taking into account the fact that the section came into operation on 4th October, 2016, and from the pleadings and submissions placed before us, it is apparent that the provisions were implemented by IEBC, who have already procured the firm of KPMG to audit the register. To this extent, the arguments against section 8A(3) have been overtaken by events, and no purpose will be served in engaging in a hypothetical exercise.

72. We also observe that section 8A(1) of the Elections Act, 2011, which is the section to apply in future elections, requires IEBC to engage a professional firm to audit the register of voters at least six months before the general election, which is a minimum period that IEBC has to undertake the activities required under this section. In our view, therefore, nothing stops IEBC from engaging the audit firm earlier than six months in order to meet the requirements under Article 227 of the Constitution and the provisions of PPADA.

Whether sections 44(4) and section 44(7) of the Elections Act 2011 are unconstitutional

73. Our findings on the constitutionality of the timelines set in section 6A(1) hereinabove also apply to the complaints made by the Petitioner about the timelines set in section 44(4) and 44(7) of the Elections Act. These sections provide for minimum timelines, and nothing prevents IEBC from undertaking the actions therein way before the set deadlines. It would appear that the Petitioner misapprehended and misinterpreted the impugned sections and their effect.

Whether section 44(8) of the Elections Act 2011 is unconstitutional for violating the independence of IEBC

74. The final issue before us is the contention that section 44(8) of the Elections Act contravenes Articles 81 and 88 of the Constitution. Section 44(8) provides as follows:-

“44(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.”

75. Article 81 provides for general principles for the electoral system as follows:-

“81. The electoral system shall comply with the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities;
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

76. Article 88 establishes the IEBC as an independent commission and enumerates its functions.

77. According to the Petitioner, the technical committee established under section 44(8) will supervise the conduct of elections contrary to Article 88 of the Constitution, which solely vests the conduct of elections on IEBC. The Respondent’s position on section 44(8) is that the section does not interfere with the independence of IEBC, as it does not hinder it from appointing members of the technical committee from within itself.

78. We have considered the submissions of the parties and the question whether the establishment and composition of the technical committee would interfere with the independence of IEBC. In this regard we have also addressed our mind to the constitutional provisions and judicial pronouncements on the independence of the IEBC.

79. IEBC is established under Article 88 of the Constitution. Under Article 88(4), IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Article 88(5) enjoins the IEBC to exercise its powers and perform its functions in accordance with the Constitution and national legislation.

80. The independence of IEBC is secured by Article 248(1)(c) which lists the commission as one of several constitutional commissions. Under Article 249 (2)(a), constitutional commissions are only

subject to the Constitution and the law. Sub-Article (b) provides that the constitutional commissions are independent and not subject to direction or control by any person or authority.

81. The independence of IEBC is also stipulated under section 26 of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 as follows:-

“Except as provided in the Constitution, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders”

82. The Supreme Court in the case of *In Re The matter of the Interim Independent Electoral Commission*, Const. Appl. No. 2 of 2011 (2011) eKLR discussed the independence of constitutional commissions and independent offices as follows:-

“The independence of Commissions is secured by Article 249(2) of the Constitution which provides that such Commissions and holders of office therein (Article 248), are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority...It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.

83. Taking the provisions of section 44(8) of the Elections Act against the constitutional requirements of independence of IEBC, we note that the section makes it mandatory for the Commission to establish a technical committee which will “oversee the adoption of technology in the electoral process and implement the use of such technology”.

84. With these functions of the Committee in mind, we also considered the composition of the Committee which shall comprise “such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary”. These provisions must be read together with the provisions of Article 88(2) of the Constitution that prohibits certain persons from being members of IEBC as follows:

“(2) A person is not eligible for appointment as a member of the Commission if the person—

(a) has, at any time within the preceding five years, held office, or stood for election as—

(i) a member of Parliament or of a county assembly; or

(ii) a member of the governing body of a political party; or

(b) holds any State office.”

85. In our view, the use of general words such as “relevant agencies, institutions or stakeholders” leaves room for inclusion of people expressly excluded by Article 88(2) of the Constitution from running the affairs of IEBC, and the composition of the committee and the functions given to it threatens the structural independence of IEBC that is guaranteed by the Constitution.

86. It is also our view that section 44(8) may be used to involve governmental, political or other partisan influences in the implementation of the electronic electoral processes contrary to Article 249(2) of the Constitution. Our finding therefore is that the effect of section 44(8) contravenes Articles 88 and 249(2) of the Constitution with respect to the independence of IEBC, and is therefore unconstitutional.

Summary of Findings

87. In summary our findings on the issues raised in this Petition are as follows:

I. We find and hold that section 6A(1) of the Elections Act, 2011 that requires IEBC to, not later than sixty days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days, is constitutional and does not violate Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution.

II. We find and hold that section 8A(3) of the Elections Act, 2011 that requires IEBC to within thirty days of the commencement of the section, engage a professional reputable firm to conduct an audit of the Register of Voters, to have been overtaken by events and is therefore moot.

III. We further find that the operative section that now governs the audit of the Register of Voters is section 8A(1) of the Elections Act 2011, which does not violate Article 227 of the Constitution.

IV. We find and hold that the section 44(4) and section 44(7) of the Elections Act 2011, that provide the timelines within which IEBC should establish an electronic electoral system are constitutional, and do not violate Articles 101(1), 136(2), 177(1)(a) and 180(1) of the Constitution.

V. We find and do hereby declare that section 44(8) of the Elections Act, 2011, that provides for the establishment of a technical committee comprising relevant agencies, institutions or stakeholders as IEBC may consider necessary to oversee the adoption and implementation of technology in the electoral process, violates Articles 88 and 249(2) of the Constitution, and is therefore unconstitutional.

VI. With respect to costs, we direct that each party bears their own costs of the Petition.

88. Orders accordingly.

DATED and SIGNED at NAIROBI this 15th day of June 2017

PAULINE NYAMWEYA MUMBI NGUGI ENOCK C. MWITA

JUDGE JUDGE JUDGE

DELIVERED at NAIROBI this 16th day of June 2017

ENOCK C. MWITA

JUDGE



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