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REPUBLIC OF KENYA
ELEVENTH PARLIAMENT- (FOURTH SESSION)
THE NATIONAL ASSEMBLY
PETITIONS

(No.12 of 2016)

CONVEYANCE OF A PETITION ON REMOVAL OF THE COMMISSIONERS
OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) ON GROUNDS OF INCOMPETENCE AND LACK OF INTEGRITY

Honourable Members, Pursuant to the provisions of Article 251 of the Constitution of Kenya and Standing Order 225(2)(b), I hereby convey to the House that my office is in receipt of a Petition from one Barasa Kundu Nyukuri, a resident of Bungoma County, seeking the removal of the Chairperson and the eight members of the Independent Electoral and Boundaries Commission (IEBC). The Petitioner cites incompetence and lack of integrity as the grounds for removal of Mr. Ahmed Isaack Hassan as the Chairperson of the Independent Electoral and Boundaries Commission (IEBC) and Ms. Lilian Bookeeye Mahiri-Zaja, Mr. Albert Camus Onyango Bwire, Mr. Kule Galma Godana, Amb. Yusuf Nzibo, Mr. Abdullahi Sharawe, Ms. Thomas Letangule, Ms. Muthoni Wangai and Mr. Mohamed Alawi as Commissioners of the IEBC.

Honourable Members, In the Petition, the Petitioner prays that the National Assembly: -

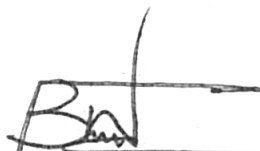
- (i) immediately deliberates on this Petition as a matter of urgency,
- (ii) interrogates and ascertains the grounds of this Petition for removal of the Chairperson and the eight Commissioners of the IEBC, pursuant to Article 251(2) of the Constitution;
- (iii) resolves that this Petition discloses sufficient grounds for removal of the said Commissioners under Article 251 (1)(a), (b) and (d) of the Constitution; and

(iv) recommends that H.E. the President appoints a tribunal to investigate the named Commissioners in accordance with provisions of Article 251 (3) and (4) of the Constitution.

Honourable Members, as you are aware the Petition for removal of persons from office in accordance with Article 251 of the Constitution is different from ordinary Public Petition. In accordance with Standing Order 230(3), this Petition therefore stands committed to the Departmental Committee on Justice and Legal Affairs for consideration. The Committee is required to guide the House, by way of a Report, on whether the Petition satisfies the grounds for removal of a member of a Constitutional Commission as stipulated in Article 251(1) and (2) of the Constitution. The Committee is required to submit its report to the House within a period of fourteen (14) days as contemplated under paragraph (4) of said Standing Order, unless the House grants a further extension. Thereafter, the House will have another ten (10) days within which to consider the report and resolve whether or not the Petition contains grounds for removal of the Chairperson and Commissioners, pursuant to Standing Order 230(5).

Honourable Members, having said that, I am aware that the Departmental Committee on Justice and Legal Affairs is currently working jointly with the Constitutional Implementation Oversight Committee on matters related to electoral reforms including electoral institution. As I said earlier in my Communication, I am also mindful that there are other crucial ongoing engagements outside Parliament touching on electoral reforms and inevitably the question of the office of the Chairperson and Members of the IEBC. I therefore urge the Committee to consult widely before tabling its report in the House.

I thank you!



THE HON. JUSTIN B.N. MUTURI, EGH, MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, 16th June 2016

7TH JUNE 2016

TO THE CLERK

NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA

PUBLIC PETITION AGAINST THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) ON GROUNDS OF INCOMPETENCE AND LACK OF INTEGRITY.

1.0. PRELIMINARY ISSUES AND PARTICULARS FOR THE PETITION:

- 1.1. **BARASA KUNDU NYUKURI** herein your Petitioner is a Kenyan citizen, registered voter, resident of Kimilili Rural Ward, Kimilili Constituency, Bungoma County in the Republic of Kenya and holder of National Identity Card Number 9996356, P.O BOX 447- 5204, TEL: 0720 369518, Kimilili in Bungoma County in the Republic of Kenya.
- 1.2. **Your Petitioner** has more than 20 years of working experience with national, regional and international organizations on matters of leadership, **governance and democracy**. He is a hands-on **Research & Training Consultant** on issues pertaining to the Constitution of Kenya 2010, the Electoral Management Bodies in Kenya (**ECK, IIEC, IEBC & RPP**). He is a renowned **specialist / expert** on electoral democracy; especially on electoral laws, electoral administration and management of the electoral process; political parties' organization and management.
- 1.3. **Your Petitioner** was part of the **Core Team** that drafted the **IEBC Act 2011, Elections Act 2011** and the **Political Parties Act 2011** under the able Leadership of **Justice Kathurima Inoti**, of the Court of Appeal, formerly the Chairman of the Kenya Law Reforms Commission (KLRC).
- 1.4. **Your Petitioner** submits this Petition to the National Assembly of the Republic of Kenya ; pursuant to his constitutional rights and fundamental freedoms stipulated in the Bill of Rights and other provisions, particularly articles 1, 2, 3, 10, 33, 35, 47, 50, **73, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 94, 95, 96, 88, 89, 97, 101, 107, 109, 115, 116, 118, 119, 124, 125, 248(2) C, 249, 250, 251(1)a, b & d, 251(2)(3),(4) (5), (6)&(7), 253, 254, 258 and 259** of the Constitution of Kenya 2010, read together with the IEBC Act 2011, the

Elections Act 2011, Public Officers Ethics Act 2003 and the Leadership & Integrity Act 2012.

- 1.5. **Your Petitioner** categorically states that IEBC as the Electoral Management Body in Kenya has the sole and ultimate responsibility of ensuring that each action, procedure and decision related to the electoral process is in line with the law (i.e., the Constitution of Kenya 2010, statute laws including the IEBC Act 2011 and Elections Act 2011, international instruments and treaties, and all other provisions).
- 1.6. **Your Petitioner** believes that the Independent Electoral and Boundaries Commission of the Republic of Kenya, hereafter IEBC, like other electoral management bodies in Africa and the world has a cardinal obligation and duty to preserve, protect and promote the enjoyment of electoral rights, giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive adjudication.
- 1.7. **Your Petitioner** asserts that the Electoral Management Body, thus IEBC in this regard is both a duty bearer and an integral and important part of the means and mechanisms for ensuring that electoral processes are not marred by irregularities, and ultimately for defending electoral rights. It should not be seen to curtail the enjoyment of rights, but should instead actually expand their enjoyment. Indeed, as the primary actor and decision-maker in the electoral process, the IEBC is the first-line duty-bearer in the delivery of electoral justice in the Country.
- 1.8. **Your Petitioner** categorically states that although IEBC is not the only institution charged with the responsibility of ensuring safeguarding electoral justice, but it is the most significant of all and therefore must provide strategic leadership in the entire electoral management process. Indeed, the constitutional and legal mandate and responsibility is bestowed upon IEBC and therefore Parliament should not entertain lame excuses and explanations from the Electoral Management Body for incompetently organizing, supervising and managing the 2013 general elections. In this regard, IEBC Team should take full responsibility for acts of omissions and/ or commissions. It should not be allowed to pass the blame on other agencies and institutions, which are subordinates and secondary in matters of the electoral administration and management.
- 1.9. **Your Petitioner observes** that the subordinate agencies institutions in the electoral in the electoral administration and management chain, include; Registrar of Political Parties (RPP), Political Parties/Coalitions (i.e., role

players and main clients of IEBC in the electoral process) the Political Parties Disputes Tribunal (PPDT), National Police Service, the Director of Public Prosecutions (DPP), Parliament, Executive, Attorney General, Judiciary, other Independent Offices and Constitutional Commissions, Media, Faith Based Organizations, Civil Society Organizations, Observe Groups and Development Partners. For instance, although the Elections Act 2011 put prosecution of electoral offences in the hands of the IEBC as donated by Article 157 of the Constitution, the police are still required to provide election-related security, to investigate election offences and to make arrests, where necessary.

- 1.10. **Your Petitioner** states that the IEBC is ultimately responsible for the counting and announcement of results, which it then certifies through a public notice in the Kenya Gazette, in effect, declaring the winners of the various electoral contests for which it is responsible.
- 1.11. **Your Petitioner** further states that IEBC receives nomination papers from candidates and thereby confirms who is eligible to contest. All the relevant notices regarding the activities preceding the election, such as nomination of candidates, and the election date are issued by the IEBC.
- 1.12. **Your Petitioner** states that all the **Election Day activities** are the responsibility of the IEBC, for which it procures all the electoral materials and ensures that there are adequate personnel (including temporary election staff) to conduct the election.
- 1.13. **Your Petitioner** appreciates the fact that there is both collective and individual responsibility of the IEBC Commissioners and Secretariat Staff in the performance of roles and functions of the Electoral management Body. Just like there **acts of omissions** and **acts of commissions** that constitute the constitutional and legal grounds of incompetence and lack of integrity. Indeed, these two (2) are the main constitutional grounds analyzed and presented in the entire Petition stipulated in **Article 251** of the **Constitution of Kenya 2010**.
- 1.14. **Your Petitioner** observes that the Constitution of Kenya 2010, IEBC Act 2011 and the Elections Act 2011 grant the IEBC vast powers over conducting and managing elections as witnessed in the 4th March 2013. There are nevertheless a number of exceptions to these general functions and powers, for which the IEBC requires the cooperation and collaboration of other state agencies. The IEBC, for instance, relies on the police service and other

disciplined forces to provide election-related security – for the safety of election materials and officials, as well as the maintenance of law and order in the venues where voting and counting of votes takes place.

- 1.15. **Your Petitioner** maintains that certification and proclamation of results Kenya's electoral law prescribes the formula by which votes cast in elections are translated into seats. With respect to the presidential election, for instance, the winner is the candidate who receives over 50% of all the votes cast in the election and at least 25% of the votes cast in each of more than half of the counties. All other seats are on the basis of a simple majority. The IEBC counts the votes and communicates the final decision regarding such seats to the electorates, candidates, political parties and the general public. In keeping with the Constitution of Kenya 2010 and enabling legislations and international legal standards, it is the responsibility of the IEBC to ensure that the processes, systems and personnel involved in the counting deliver credible results devoid of fraud.
- 1.16. **Your Petitioner** categorically states that the Independence, effectiveness and regulation of the Electoral Management Body (EMB) is critical to election administration and is one of the most widely debated issues in election administration and management. It is of critical significance for a Country's electoral process that the Electoral Management Body herein IEBC managing the elections be seen to be independent of any Political Party whether it is the **Ruling Jubilee Alliance** or the **Opposition CORD Coalition**, any other political party and of the Government of the Day.
- 1.17. **Your Petitioner** observes that the Constitution of Kenya 2010 in **Articles 88(5) & 249**, envisages an Electoral Management Body that is, by design and in law, intended to be free of undue influence from the executive and other electoral actors and stakeholders.
- 1.18. **Your Petitioner** observes that the IEBC has the latitude to hire its own professional staff. The IEBC, as a constitutional commission, also has operational independence from government. In real terms, however, there are a number of concerns. The constitutional and legal provisions do not entirely shield the appointment process from political horse-trading. This is especially so when the **appointment criteria include ethnic and regional diversity considerations** that may not always be applied with perfection.

- 1.19. **Your Petitioner** observes that most of the current permanent staff at management level and those in the field including Directors, Managers, Regional Coordinators and Constituency Election Coordinators were not recruited through a very competitive and very transparent criteria and system. Except a few, most of them were recruited by former commissioners of the defunct Independent Interim Electoral Commission (IIEC) through proxy, favouritism and nepotism. In this regard, these staff can not be said to be purely professional and are immune from manipulations and internal conflicts of interest. This partly explains the perennial cold war between the Chairman of IEBC and the former Secretary as to why there were two or more centres of power in both IIEC and its predecessor IEBC. Needless to mention that the former Secretary of the Commission James Oswago had hotly contested to be the chair of IIEC against **Ahmed Isaack Hassan** who eventually became the Chairman through intense lobbying and advocacy from the ***“political brokers” in the corridors of power*** and **James Oswago** settled eventually for the post of the Chief Executive Officer/ Secretary of the Commission. Ironically, James Oswago was appointed several months after the secretariat staff, managers and field staff had already been hired by the IIEC Commissioners, contrary to human resource procedures and best practices in the public service, where under normal circumstances, the Secretary of the Commission could have been the one in charge of staff recruitment.
- 1.20. **Your Petitioner** strongly believes that is one of the major reasons for perennial internal conflicts and antagonism at in the IIEC and now IEBC was the fraudulent recruitment of staff for the 8 Directors of Directorates, 17 Regional Election Coordinators (RECs) and 290 Constituency Election Coordinators (CECs). That most of these staff who were not only recruited on the basis of ***“Technical Know Who rather Technical Know How”*** were expected to be competent in managing the 2013 general elections. Indeed, this Parliament and other role players in the electoral process will be expecting too much from the **same (very)** staff at the national secretariat and to be competently and impartially manage the forthcoming general elections. Worst still the IEBC recently resolved redeploy back these field staff to the stations (counties and constituencies) where they were originally recruited from. This is another disaster or election fiasco in the making as we move closer to the next general elections. I call upon parliament to use its wisdom and not spare any efforts to vet afresh all the Headquarters and field staff of staff at IEBC. More so, for senior management staff at the level of Commission Secretary, Deputy Commission Secretary, Directors and

Managers, there is need for this Honourable House to recommend to EACC for an urgent and comprehensive lifestyle audits. The Director for Elections Operations and Voter Registration **Ms Immaculate Kassait** should be fired for the incompetent manner in which she handled election operations and voter registration in the 2013 general elections, while the Director for Legal and Corporate Affairs **Ms Praxides Tororei** should be fired for the huge and exaggerated legal fees demanded/paid to *some "preferred/ favoured law firms" during the election petitions*, especially the controversial Presidential Election Petition of **Raila Odinga Vs Uhuru Kenyatta** and IEBC at the Supreme Court of Kenya and numerous ones at various High Courts and Magistrates Courts in different parts of the Country. Parliament though PAC should investigate the genuineness of the legal fees paid by the IEBC to firms that were *"friendly or well known"* to either the Chairman and/or the Director of the Legal and Corporate Affairs Directorate.

- 1.21. **Your Petitioner** informs Honourable members of parliament that the genesis of incompetence and loss of integrity at IEBC is the aspect of staff recruitment which was unprofessionally handled by the IIEC Commissioners under the chairmanship of the current chairman of IEBC.
- 1.22. **Your Petitioner** observes that some of the IEBC's decisions made during the 2013 general elections have raised doubts regarding its independence – chiefly the election date controversy, its waffling and prevarication over Diaspora voting arrangements until politicians waded into the fray and its apparent inability to make large procurements without undue influence either from suppliers or their political proxies. From the experience of the 2013 general elections, the Petitioner asserts that the Independent Electoral and Boundaries Commission absolute independence was in theory than in practice, with regard to some decisions.
- 1.23. **Your Petitioner** further observes that the process of procuring the Biometric Voter Registration (BVR) illustrates the fact that, the IEBC is also not absolutely immune from the influence of corruption cartels and interference from overzealous Government of the Day operatives as was the case of the Grand Coalition Government leaders headed by **Hon. Mwai Kibaki**, former President of the Republic of Kenya and **Hon. Raila A. Odinga**, Former Prime Minister of the Republic of Kenya, during the count down to the 4th March 2013 general elections. Indeed, as a result of the **incompetence of IEBC and its weak and conflicting internal governance structure** highlighted elsewhere in this Petition; the said top leaders in the Government managed to influence the procurement of the BVR, EVID and RTS Kits, despite the IEBC aware of the fact that time had run out for the

voter registration and therefore it was not prudent and cost effective to procure, test and train election staff on the new technology before the election day. It was absolutely *unwise and technically an incompetent* decision for the IEBC Team to succumb to external political pressure s as to allow last minute procurement of the said kits.

- 1.24. **Your Petitioner** maintains that the IEBC Team failed to preserve its independence and interference from the Government of the Day was called into question was over the BVR procurement saga. At the height of the BVR controversy, the IEBC cancelled the tendering process and it seemed evident that the Country would have to fall back to the previous manual system (against huge public expectations riding on the BVR system). At this point, the Executive arm of Government of Kenya intervened by entering into an agreement with the Canadian Government, which led to the kits eventually being delivered by **Safran Morpho**, a French supplier sourced by a Canadian Crown corporation.
- 1.25. **Your Petitioner** asserts that it was the *IEBC's incompetence and failure* that paved the way for the Executive interference in the IEBC's domain, the IEBC Team was of the view that the intervention was necessary and, in any event, did not in any way interfere with the IEBC's discharge of its mandate. However, one thing that is clear is the *fact that the Executive Arm of Government of Kenya would not have played a role in the acquisition of this technology had the IEBC managed the procurement process competently*. It is important to note that, though, that Electoral Management Body procurement has always been problematic and accusations of corruption in the process are not new. It will advisable for the future procurements to be handled by an independent procurement agency other than the electoral management body itself, that comes to haunt its image, credibility and integrity, which in turn erodes its public rating and confidence.
- 1.26. **Your Petitioner** without prejudicing the delayed but on-going investigations by the Ethics and Anti- Corruption Commission (EACC) states as follows: In October 2013, Britain's Serious Fraud Office brought charges against British company Smith and Ouzman Limited, a supplier of Kenyan ballot papers, for corruptly winning tenders totaling nearly half a million pounds, contrary to the Prevention of Corruption Act. As this supplier continues to be favoured by the IEBC, Kenya's public interest in the case and its outcome is increasingly and understandably high. Locally, James Oswago

(the then Secretary of IEBC) Wilson Kiprotich Shollei (then Deputy Commission Secretary, Support Services), Edward Kenga Karisa (then Finance and Procurement Director) and Willy Gachanja Kamanga (then Procurement Manager) are charged in connection with the procurement of voter registration kits that were used in the 4 March 2013 general elections. The current Chairman of IEBC Ahmed Isaack Hassan and Commissioner Dr. Yusuf Nzibo were also adversely mentioned in the now famous "**Chickegate**" Scandal and are being investigated by the EACC and we are curiously waiting for a Report as an outcome of these investigations before making further comments on the innocence or otherwise of all those mentioned in the scandal. However, the **Petitioner** takes solace in the popular adage that ***justice delayed is justice denied*** and therefore EACC must fast track its investigation on this matter of public interest or lest it stands accused of being responsible for the delay.

- 1.27. **Your Petitioner** further states that shortly thereafter, the IEBC Procurement Manager and four of his colleagues (Adan Katello Adano, Kennedy Guanye Ochaie, Abdi Elema Ali and Gabriel Ngonyo Matunga) were charged with fraud over the purchase of solar lanterns worth **KSh 200 million (USD 2.3 million)**. They were charged together with Benson Gethi Wangui and Joyce Makena, co-directors of Solarmak Technologies, the IEBC supplier of solar lanterns. They have all since been suspended from duty by the Commission.
- 1.28. **Your Petitioner** asserts that it was a manifestation of ***incompetence and lack of integrity on the part of the IEBC Team when they allowed one side of the political divide to influence or comment on its decision on the Date of Elections after attending a meeting at State House***. The Constitution stipulates that a general election of MPs shall be held on the second Tuesday in August in every fifth year, at which point the term of each House of Parliament expires. It is also at this same general election that the election of a President and Deputy President, Governors and Deputy Governors and members of the county assemblies are to be elected. However, for the first elections under the Constitution, the Transitional and Consequential Provisions provide in Section 10 that the National Assembly existing immediately before 27 August 2010 'shall continue as the National Assembly for the purposes of this Constitution for its unexpired term'. Subsequently, a raucous national debate and controversy ensued regarding when the next general elections were to be held, with some contending that these elections ought to be held in August 2012, while others argued that they

should be held either in December 2012 (in line with past general election practice) or March 2013 (upon the expiry of the term of the Parliament in session). The matter was eventually taken to the Supreme Court for adjudication, which referred it to the High Court. The High Court ruled that the elections would be held on 4 March 2013 or 90 days after dissolution of the Grand Coalition Government, whichever occurred sooner.

1.29. **Your Petitioner** observes that the IEBC thereupon declared that it would make arrangements for a 4 March 2013 election date. At this point, the then President Mwai Kibaki and his side of the Grand Coalition Government proclaimed support for the 4 March 2013 date, before the court ruling, while the then Prime Minister Raila Odinga and his supporters spoke out in favour of a December 2012 election date. The Court of Appeal upheld the 4 March 2013 date by a majority. Though public opinion is still divided on whether the IEBC exercised independent thought on the election date issue, it maintained that it was merely implementing a court decision, and that it (in fact) arrived at its decision long before the President spoke.

1.30. **Your Petitioner** observes that closer to the elections, the parliamentary departmental committee on justice and legal affairs summoned the IEBC over the BVR tendering process and the delays in the promulgation of election rules and regulations.

1.31. **Your Petitioner** further observes that after the 2013 general elections, the National Assembly's Public Accounts Committee also ordered an investigation into the BVR tendering process, which continues to date. In this way, Parliament exercises a check on the manner in which the IEBC discharges its constitutional obligations. Parliament is entitled to inquire into its conduct and to make decisions to safeguard the public interest.

1.32. **Your Petitioner** observes that the IEBC's conduct in recent engagements with Parliament also raises some questions regarding its integrity and credibility. After a delay of over four months, when the IEBC finally appeared before the National Assembly's departmental committee on Justice and Legal Affairs to present the final election results in response to concerns over the

delayed disbursement of the Political Parties Fund, its officials initially refused to present the results under oath.

1.33. **Your Petitioner** maintains that the manner in which the BVR procurement was handled and the ensuing controversy dented the IEBC's image with respect to the integrity of its systems and officers. It also delayed voter registration by over six months. As a consequence, the time originally set aside for voter registration had to be reduced to 30 day, while the IEBC proposed to Parliament that the time for inspection of the voters' register be reduced to 15 days. Parliament obliged by passing the Statute Law (Miscellaneous Amendments) Act, 2012. It does not help matters that the electronic poll books and the results transmission system eventually failed and are now the subject of EACC and parliamentary scrutiny, further tainting the integrity and credibility of IEBC as currently constituted.

1.34. **Your Petitioner** questions the rationale of **Mr. Joseph Kinyua**, the Head of Public Service in his letter to the Chairman of IEBC instructing him to donate BVR Kits and other equipment to Burundi for her General Elections. The Chairman of IEBC should be compelled to table minutes of the Plenary that approved this particular borrowing of election materials. While there could be an administrative explanation that regional election bodies can benchmark and share information and resources including the said equipment, there can be no valid reason as to why IEBC a constitutionally Independent Electoral Management Body could entertain and obey the direction of the Head of the Public Service. This raise a further ***question on the extent of IEBC operation independence, decision making and communication protocol at the Commission and the degree of unity of purpose*** between the Chairman and the members of the Commission, who advised against the Burundi deal and whose advice was blatantly ignored by an overbearing and highly opinionated Chairman. ***Needless to point out that any decision of IEBC must be supported by at least four members of the Commission, but this was not the case for the Burundi deal. Indeed, this was a unilateral decision by Ahmed Isaack Hassan, the Chairman of IEBC.***

2.0. GROUNDS FOR THE REMOVAL THE CHAIRMAN AND EIGHT (8) MEMBERS COMMISSION OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC):

2.1. This **Petition** is conceived by **BARASA KUNDU NYUKURI**, herein the **Petitioner**, pursuant to the provisions of Articles **119** and **251** of the Constitution of Kenya 2010. **Article 119** provides the Petitioner with the right to Petition Parliament and **Article 251** provides the Grounds and procedure for the removal of a member (s) of an independent Commission from Office. He argues that any other process to remove the members of the IEBC from office is unconstitutional and illegal and should not be approved by Parliament. The members of the IEBC who are the main subject of this Petition are:

1. MR. AHMED ISAACK HASSAN - CHAIRMAN
2. MS. LILIAN BOKEEYE MAHIRI- ZAJA - COMMISSIONER
3. MR. ALBERT CAMUS ONYANGO BWIRE - COMMISSIONER
4. MRS. KULE GALMA GODANA - COMMISSIONER
5. AMB. YUSUF NZIBO - COMMISSIONER
6. ENG. ABDULLAHI SHARAWA - COMMISSIONER
7. MR. THOMAS LETANGULE - COMMISSIONER
8. MS. J. MUTHONI WANGAI - COMMISSIONER
9. MR. MOHAMED ALAWI HUSSUN - COMMISSIONER

NOTE: The IEBC Staff to be vetted afresh by EACC via the recommendation of Parliament include the Commission Secretary, 2 Deputy Secretaries, 9 Directors, Managers, 17 Regional Election Coordinators and 290 Constituency Coordinators

2.2. Your **Petitioner** observes that although the approach by the Hon. Samuel Chepkonga led Committee to collect views from the Kenyan public and stakeholders in the electoral process may be a noble idea it is not grounded in the Constitution. In fact, is more of a political and quick fix solution that it is contrary to the procedure stipulated provided for in **Article 251** of the Constitution of Kenya. The same applies to the protests and dialogue approach of Hon. Raila Odinga and the Cord fraternity and other opposition parties' and civil society proposals.

2.3. Your **Petitioner** warns that all the aforementioned approaches have been politicized and adopted, but yet they are unconstitutional and ***should be immediately abandoned*** to allow this Petition go through its stages to maturity so that an amicable solution is found, without compromising or violating the constitutional rights and fundamental freedoms of the members and staff of IEBC. Some of these approaches are only useful in terms of comprehensive reforms but not in the removal of IEBC from office.

2.4. Your Petitioner observes that the issue of comprehensive electoral reforms, including reforms in the Electoral Management Body (EMB) should be separated from the glamour for disbandment of the IEBC, which must necessarily take a constitutional path stipulated in **Article 251 alone, unless the IEBC members voluntarily resigns there is no short cut** to this process as stipulated in **Article 3**, where every citizen and/or state organ is required to protect, uphold, promote and defend the Constitution. . .

2.5. Your Petitioner further observes that the proposal by the President of the Republic of Kenya **Uhuru Muigai Kenyata** and Deputy President **William Samoi Ruto** on the formation of a Parliamentary Committee similar to IPPG to deal with the IEBC saga is also noble but again not supported by the provisions of Article 251 of the Constitution of Kenya 2010, in terms of the procedure for removal from office of members of an independent constitutional commission like IEBC. The same applies to the initiative fronted by the **150 Members of Parliament** from across the political parties/ coalition divide thus CORD (i.e., ODM, WDMK &, Ford Kenya) and Jubilee, including KANU, New Ford Kenya, Ford People, among others.

2.6. Your Petitioner explores only **two (2)** constitutional grounds for the removal of the Chairman, commissioners (members), Chief Executive Officer/ Secretary of the commission and directors of the Eight Directorates of IEBC; thus **incompetence** and **lack of integrity**:

2.7. Your Petitioner states that the Chairman of the IEBC together with the other Eight Commissioners, Commissions Executive Officer/ Secretary and Directors of the 8 Directorates, who organized, managed and supervised the 4th March 2013 General Elections were **incompetent, lacks integrity** and **credibility** to preside over the next general elections in the Republic of Kenya and therefore parliament should start a process of removing them from office immediately. This Petition is based on the following particulars and manifestations of their incompetence, inability, incapacity and lack of integrity as well as lack of public confidence in the IEBC as is currently constituted.

2.8. Your Petitioner states that because of incompetence, the IEBC Chairman, other eight commissioners and senior secretariat staff did not correctly interpret, internalize and effectively execute the powers and functions of the Independent Electoral and Boundaries Commission (IEBC) as stipulated in Article 88 of the Constitution of Kenya 2010. The Constitution mandates the IEBC to conduct or supervise referenda and

elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament.

2.9. Your Petitioner groups and analyses the functions of IEBC into three broad categories, based on a typical electoral cycle: **pre-election period**, **election period** and **post-election period**:

2.9.1. Your Petitioner states that in the pre-election period, the IEBC is responsible for:

- *Delimiting constituencies and wards;*
- *Continuous registration of citizens as voters;*
- *Regularly revising the voters' roll;*
- *Regulating the process by which political parties nominate candidates for the elections;*
- *Settling electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;*
- *Registering candidates for elections;*
- *Voter education;*
- *Facilitating the observation, monitoring and evaluation of elections;*
- *Regulating the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;*
- *Developing a code of conduct for candidates and parties contesting elections; and*
- *Monitoring of compliance with legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties.*

2.9.2. Your Petitioner states that during the election period, the IEBC is responsible for:

- *Voting and other Election Day operations;*

- Counting and verifying results; Announcing results; and
- Handling complaints and appeals by candidates.

2.9.3. Your Petitioner states that in the post-election period, the IEBC is responsible for:

- Evaluating and auditing its operations;
- Organizational assessment and strengthening; and
- Promoting electoral reform.

2.9.4. The Petitioner states that, in performing these functions, Section 4 of the IEBC Act requires the IEBC to investigate and prosecute candidates, political parties or their agents for electoral offences pursuant to Article 157(12) of the Constitution and use appropriate technology and approaches in the performance of its functions. In this regard, because of incompetence, the IEBC Team failed to investigate and prosecute electoral offenders as will be illustrated later in the context of this Petition by the Judgments in the Bungoma Senatorial Electoral Petition NO.6 of 2013 in at the High Court of Kenya at Bungoma, Court Appeal of Kenya at Kisumu and Supreme Court of the Republic of Kenya at Nairobi.

2.9.10. Your Petitioner states that the IEBC Team incompetently handled the Senator Moses Masika Wetang'ula ***Electoral Offence Saga on Bribery*** and Treating in the **Election Petition No.3 of 2013** that had gone through hierarchy of the structure of the Judiciary from the **High Court** of Kenya, **Court of Appeal** of Kenya at Kisumu and the **Supreme Court of Kenya** at Nairobi. Indeed a total of eleven (11) **distinguished Judges** handled and confirmed the offence which was rubbished by an IEBC Select Committee headed by Commissioner **Thomas Letangule**. The said select committee never called any witness to testify before, except the victim of the court ruling thus Senator Wetang'ula and his team of lawyers and supporters. It is instructive to note that one **Moses Wanjala Lukoye**, who had written a letter of complaint to the same IEBC on 2nd of September 2015, was neither summoned to appear nor even acknowledged in the Report prepared by the Commissioner **Thomas Letangule led Select Committee**. One wonders whether this was fair hearing inline with the directive principle of the constitution as stipulated in **Articles 47 and 50** on fair administration of justice and fair hearing, respectively. ***This was a proof of IEBC incompetence in terms of its capacity to address elections offences and for now***

one can engage in bribery and treating or any other serious electoral offence without fear of being removed from the voters' register or being disqualified from participating in a by election or holding an elective office by IEBC.

3.0. Your Petitioner from the foregoing background and preliminary information; analyzes the extent of incompetence, inability, ineffectiveness, inefficiency, lack of capacity of the IEBC Team to perform its constitutional and legal duties and responsibility in each of the categorized functions; with the view of ascertaining whether or not the Team competently and with integrity or lack of it performed roles as stipulated in various articles of the Constitution of Kenya 2010, IEBC Act 2011, Elections Act 2011 and other statutes:

3.1. IEBC incompetence and lack of integrity manifested in the delimitation and boundary demarcation as stipulated in Article 89 of the Constitution of Kenya 2010;

3.1.1. Your Petitioner states that Constituency and Ward delimitation and boundary demarcation Kenya is one of the functions of the IEBC. The commission is required to delimit constituencies and demarcate their boundaries because the country's electoral system still relies on geographical constituencies to elect a large majority of its elected officials. Kenya has, since the March 2013 general election, a bicameral Parliament consisting of a National Assembly and a Senate at the national level.

3.1.2.. That the IEBC is required to review the names and boundaries of constituencies at intervals of 8–12 years, and review the number, names and boundaries of wards whenever the names and boundaries of counties are reviewed. The IEBC conducted the first review of boundaries under the new Constitution from January to March 2012, in which it proposed the establishment of 290 constituencies in line with the Constitution. The IEBC also fixed the number of wards at 1,450 and delimited their boundaries.

3.1.3. Your Petitioner observes that the IEBC delimitation and demarcation of ward and constituency boundaries before the general elections of 4th March 2013 process was generally perceived by different communities, political parties, voters and candidates to be unfair and irregular as there were **134 suits** filed in various courts against the Commission, by various people and interest groups. Although the High Court ruled that the IEBC's handling of the constituency and ward delimitation exercise had, by and large, been transparent and fair, many communities, political parties and candidates in the affected electoral areas remained unsatisfied with the boundaries

created by IEBC and ratified by the courts. The Country went to the 2013 general elections with the constituencies resulting from this delimitation, despite the discontent by a cross section communities and stakeholders.

3.2. Incompetence manifested in the failure of IEBC Team to effectively conduct its Voter Registration and maintain an accurate principal register of voters as stipulated in Articles 81, 82,83 &88 of the Constitution of Kenya 2010;

Article 81 of the Constitution states that electoral system and process 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*
 - (vi) and accountable manner.*

3.2.1. Your Petitioner states that the IEBC's voter registration role is provided for in Articles 82, 83 and 88 of the Constitution. The mandate to prepare a voters' register and to revise it regularly is conferred by Article 88 of the Constitution. Article 82 requires Parliament to enact legislation to provide for, among others, *the continuous registration of citizens as voters, the progressive registration of citizens residing outside Kenya, and the progressive realization of their right to vote.* Article 83 (2) states that a citizen who qualifies for registration as a voter shall be registered at only one registration centre, while Article 83(3) states that 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. **In this regard, the IEBC Team failed to fulfill these constitutional requirements in the registration of voters for the 4Th March 2013 general elections.**

3.2.2. The **Petitioner** further states that the IEBC Act 2011 reiterates the constitutional requirements regarding the voters' register, while the Elections Act, 2011, contains detailed provisions on how voter registration is to be conducted.

3.2.3. The **Petitioner** observes that after the registration process, the IEBC is expected to prepare the Principal Register of Voters (PRV). Once the PRV is compiled, the IEBC is required by law to:

- *Update the PRV regularly by deleting the names of deceased voters and rectifying the particulars therein, as appropriate;*
- *Conduct fresh voter registration, if necessary, at intervals of not less than eight years, and not more than 12 years, immediately after the commission reviews the names and boundaries of the constituencies; and*
- *Revise the PRV whenever county boundaries are altered.*

3.2.4. **Your Petitioner** avers that in a period of at least 30 days before an election, the IEBC is required to publish a notice to the effect that the compilation of the Principle Register of Voters (PRV) has been completed, and to provide every registration officer with a copy of the register relating to her or his constituency for safekeeping at the constituency office of the IEBC. A copy of the PRV is also kept at the IEBC headquarters.

3.2.5. **Your Petitioner** further states that when the PRV is compiled, or whenever it is altered or reviewed, the IEBC is supposed to make it available for public inspection. In this regard, because of incompetence and inefficiency of the IEBC Team, members of the public (registered voters) were not given adequate time to either file claims for registration or objections against registration or to make any necessary rectifications as necessary. This was the opportunity, for example, to verify claims of voter importation and to take appropriate action if warranted.

3.2.6. **Your Petitioner** asserts that the IEBC Team failed to meet its statutory time lines on Voter Registration Process because of its internal disorganization and incompetence. Originally scheduled for August 2012, the process of registering voters

for the 2013 general election began on 19 November 2012 and was concluded on 18 December 2012.

3.2.7. That the month-long exercise, initially delayed owing to **failure** and **inability** of IEBC to procure Biometric Voter Registration (BVR) kits in time. The IEBC Team had set and disbanded a total of three(3) procurement committees because of **internal conflict of interest** among commissioners, the then Chief Elections Officer and Directors of various directorates and other senior secretariat staff. The Team eventually managed to register a total of **only 14.3 million voters**, far less than its target of at **least 18million voters**. The net effect of this manifestation of **incompetence** and **ineffectiveness** on the part of the IEBC Team disfranchised a sizable number of potential voters in the 4th March 2013 General Elections.

Your Petitioner reference to the PAC Audit is to illustrate the incompetence and possible conflict of interest in the procurement process of Election Equipment and not necessarily to prove culpability of the commissioners and committees involved. PAC is yet to review the Petition by some members of the affected tender committees to determine their culpability or otherwise. According to the PAC Report, there were vested interests in the Commission. It was alleged that the Chairman, **Mr. Isaack Hassan and Commissioners Mr. Mohamed Alawi Hussun and Mr. Thomas Letangule** and others in the secretariat fronted Face Technologies. It was further claimed that the CEO favoured 4G Identity Solutions. This is what led to the stalemate during procurement culminating in the CEO terminating the tender. The Chairman claimed executives of bidding companies used to visit the CEO's office and not his.

The 2nd Tender Committee led by **Ms. Immaculate Kassait** recommended award to Face Technologies which had quoted Kshs. 825,745,941.31 above budget. This was in direct contravention of Regulation 10(d) of the Procurement Regulations as well as Section 26 (3) of the Public Procurement and Disposal Act, 2005 that require that a Tender Committee awards within available funds.

THE Parliamentary Accounts Committee (PAC) Findings:

The Committee was guided by witness statements, evidence submitted and its observations in the site visits it conducted to assign responsibility and culpability for errors of omission and/or commission. With this, the Committee was alive to Article 226(5) of the Constitution which states that:-

"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."

Specifically, the Committee notes the powers and functions of the IEBC as spelt out in the Independent Electoral and Boundaries Commission Act, 2011, as well as the responsibilities of the IEBC as spelt out in Article 88 of the Constitution.

The Committee apportioned responsibility of its findings to the following:-

1. MR. AHMED ISAACK HASSAN

Mr. Isaac Hassan, Chairman IEBC, is directly responsible for:-

- i. Involvement in procurement by personally appointing lawyers to act for the Commission in the Presidential petition case at the Supreme Court. See appointment letters for legal counsel as evidenced in annex 4.*
- ii. Rendering the CEO unable to effectively perform his functions by vetoing human resource deployment in the Commission. Mr. Hassan nullified the deployment of Mr. Bernard Nyachieo despite the Director Finance and Procurement and the CEO indicating lack of support from the said officer.*
- iii. Failure to bring to the attention of the Commission reservations from ICT experts from IFES as to impending malfunction of the EVIDs kits. The warning became a reality on Election Day when the devices failed.*
- iv. Jointly failing to heed the Attorney General's advice on the BVR procurement and hence inevitably contravening procurement laws.*
- v. Failure to provide leadership in ensuring Commissioners provided policy direction and secretariat allowed running day to day operations.*

COMMISSIONERS

Commissioners Ahmed Isaack Hassan, Ms. Lilian Bokeye Mahiri-Zaja, Mr. Albert Camus Onyango Bwire, Mr. Mrs. Kule Galma Godana, Amb. Yusuf Nzibo, Eng. Abdullahi Sharawe, Mr. Thomas Letangule, Ms. J. Muthoni Wangai, and Mr. Mohamed Alawi Hussun, are collectively responsible for the following inequities:-

- i. Abdicating their oversight duty by collectively failing to ensure adherence to a procurement plan to guide procurement. This provided the secretariat with the leeway to mismanage the process, leading to delivery of essential gadgets up to a day before the Election Day.*

Failure to conduct staff analysis of the Secretariat inherited from IIEC to ensure competence. This led to the collapse of the whole results transmission process. The Commissioners themselves admitted to being misled by the ICT Director to the very end.

Allowing the CEO to vary contract for delivery of EVID kits without first looking into the requisite consequences and the law.

MAJ. (RTD.) JAMES O.H. OSWAGO

On matters finance, responsibility lay with the Accounting Officer as per the Constitution and the Public Finance Management Act, 2012 as well as the IEBC Act, 2011. The Committee found Mr. James O.H. Oswago, culpable in the following manner:-

- i. As the Accounting Officer, he failed to ensure strict adherence to the Public Procurement and Disposal Act, 2005 and Procurement Regulations 2006 16(4), by appointing Ms. Decimah I. M'mayi and Mr. Edward Karisa to the Evaluation Committee and due diligence team to India despite some of the members having served in the Tender Committee. This was contrary to the regulations.*

ii. Failure to perform functions vested in the office of the Accounting Officer as stipulated in Section 10 of the IEBC Act, 2011, leading to inability of the IEBC to procure BVR devices which occasioned a costly loan by the Government of principal Kshs.6,480,000,000.

Inability to perform functions vested in the office of the Accounting Officer as stipulated in Section 10 of the IEBC Act, 2011, leading to late and hasty procurement of EVID kits. This made it impossible to train personnel and conduct test runs on the kits on time.

iv. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulation 31 (b) of the Public Procurement and Disposal Regulations, 2006.

v. Negligence in ensuring that EVID kits were inspected and accepted on delivery.

vi. Payment of Kshs.1,431,997,965.00 to M/s. Face Technologies without due diligence. Procedure demands that an Inspection certificate be among the documents attached for approval of final payment.

vii. Failure to heed the Director ICT's advice against procurement of EVIDs.

MR. WILSON SHOLLEI

His appointment letter specifically places procurement functions under his responsibility. The Committee found Mr. Wilson Shollei culpable of the following acts;

i. Failure to perform functions stipulated in his appointment letter, which resulted to IEBC to procure BVR devices which led to a costly loan by the Government.

ii. Inability to perform functions stipulated in his appointment letter, leading to late and hasty procurement of EVID kits. This made it impossible to train personnel and conduct test runs on the kits on time.

iii. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulations 31(b) of the Procurement Regulations, 2006.

iv. Failure to ensure that EVIDs kits were inspected and accepted on delivery.

MR. EDWARD KARISA

The former Director, Finance and Procurement failed to perform his functions in accordance to the law;

i. Variation of contract to Ms. Face Technologies for the procurement of an extra 4,600 kits. This was beyond the allowed threshold of 10% as stipulated in Regulations 31(b) of the Public Procurement and Disposal Regulations, 2006.

- ii. *Inability to ensure that EVIDs kits were inspected and accepted on delivery to ascertain quality and value for money.*
- iii. *Processing payment of Kshs. 1,431,997,965.00 for Ms. Face Technologies without due diligence. Procedure demands that an Inspection certificate be among the documents attached for approval of final payment.*
- iv. *Being part of the due diligence team that traveled to India knowing too well that he had sat in the tender committee, contrary to Regulation 16(4) of the Public Procurement and Disposal Regulations, 2006.*

MR. BERNARD NYACHIEO

The then procurement manager failed to ensure strict compliance to the procurement regulations, as the head of this department. He specifically failed to avail the tender opening register as required by Section 60(6) of the Public Procurement and Disposal Act, 2005.

TENDER COMMITTEES

(i) Members of the 2nd BVR Tender Committee namely Ms. Immaculate Njenge Kassait, Mr. Joel Mabonga, Mr. Peter Ibrae, Ms. Nancy Kariuki, Mr. Mohamed Jabane, Ms. Dinah Liech, Mr. Bilha Kiptugen and Mr. Bernard Nyachieo, recommended award of tender to Face Technologies that quoted well above budget, contrary to Regulation 31(b) as it went beyond the allowed threshold of 10% as stipulated in the Public Procurement and Disposal Regulations of 2006. The Public Accounts Committee finds suspicion in the Tender Committee's determination to award the contract to Face Technologies.

(ii) The ERTS Tender Committee members composed of Ms. Beatrice Sungura-Nyabuto, Mr. Edward Karisa, Mr. Joel Mabonga, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Willie Kamanga and Ms. Dianah Mwacharo, used quotations to procure 5,951 mobile phones at a cost of Kshs.17,847,049.00, in addition to procurement of audio-visual equipment at a cost of Kshs. 5,078,480.00, well above the Kshs.1 million threshold contrary to provisions of the First Schedule of the Public Procurement and Disposal Regulations 2006.

(iii) The ERTS Tender Committee members comprising Mr. Edward Karisa, Mr. Bilha Kiptugen, Ms. Dinah Liech, Mr. Lemiso Godfrey, Mr. Willie Kamanga and Ms. Milcah Chebosis directly procured WAN connectivity from Safaricom Limited at a cost of Kshs.6,132,013.00 in contravention of Section 74 of the Public Procurement and Disposal Act, 2005.

(iv) The EVIDs Tender Evaluation Committee of Ms. Decimah I. M'mayi, Mr. James Gichuhi, Mr. Steven Ikileng, Mr. Michael Ouma, Mr. Godfrey Lemiso, Mr. Reuben Chirchir, all of IEBC; and Mr. Wilfer Kibii and Mr. Washington Okoth of KEBS; and Mr. Thomas Odhiambo of e-Government was found to have breached Regulation 16(6) of the Procurement Regulations by failing to

conduct individual evaluations. It therefore cannot be ascertained that the process was free and fair.

MR. EZRA SIMIYU CHILOBA

The current CEO paid a claim of about Kshs.258 million to Face Technologies for the extra claims that arose from the variations. This payment was irregular as it was not supported by a valid contract. The former CEO had indeed declined to effect payments on the claim.

3.2.8. The **Petitioner** contents that IEBC Team because of its incompetence and inability, missed the golden opportunity to effectively implement the BVR system that would have reinforced the integrity of the voters' register and introduced efficiency in the process of voter registration. The BVR process if administered effectively and efficiently by the IEBC Team, would have fully automated the entire voter registration process by automatically generating a national register, county register and constituency register more efficiently than would be the case with a manual system. We could not have had the cumbersome and challenging process of relying on several voters registers which were not only confusing but raised a lot of questions, suspicion and mistrust among the electoral process stakeholders about the ability and competency of the IEBC to produce an accurate and verifiable Principle Register of Voters (PRV) for the 2013 general elections and subsequent ones. The interface between the BVR and EVID systems was not effectively handled by the IEBC Team and therefore the EVID Kits did not accurately represent the final certified voter register used in the 2013 general elections. Original planning was for the voter registration data to be uploaded into EVID systems within the month of January 2013. This was not possible for the IEBC Team due to the finalization of the voter register and the late delivery of EVID kits. EVID devices did not begin to arrive at the IEBC warehouse until February 12, 2013, and the final delivery did not occur until February 28, 2013. The Electronic Transmission of results using mobile phones was yet another fiasco of the IEBC Team. The IEBC's Electronic Vote Tallying System (EVTS) was also dysfunctional because of a number of shortcomings; *there was poor user interface, lack of security mechanism to protect data being transmitted, lack of feedback mechanism to presiding officers confirming the successful transmission of results, lack of functionality to handle more than one election at the same time and lack of integration capacity with digital maps.* Again, this is a pointer to incompetence in terms of poor planning, ill – preparedness of the IEBC Team.

3.2.9. The **Petitioner** categorically states that the IEBC Team failed to effectively link and integrate the BVR system into the Electronic Voter Identification System/ devices

which arrived on the eve of the 2013 general elections and most staff, especially filed staff in charge of voting were not given any humble time and opportunity to get properly trained on the operations and workings of the new technologies introduced by the IEBC Team at the last minute. The IEBC Team failed to link the same BVR-EVID integrated system to the political party membership to the voter register – which was a critical element for managing the nomination of candidates. This partly contributed to the mess witnessed during the nomination processes of most political parties who attempted to use the IEBC Registers to cross-check the names of their members who were participating in their respective party nomination exercises.

The PAC audit established the following on the BVR:-

- I. There was no evidence that the procurement plans for 2011/2012 and 2012/2013 were approved by the IEBC management.*
- II. The tender opening minutes for the BVR tender were only signed by the Chairman and Secretary, while the Tender Opening Committee opened financial proposals and technical proposals at the same time, which was contrary to the Public Procurement and Disposal Act, 2005 and Regulations 2006.*
- III. The Accounting Officer irregularly appointed persons to the evaluation and due diligence team for a trip to India.*
- IV. There was no evidence that the CEO consulted the Commission or the Tender Committee before he terminated the first BVR tender.*

EVIDs

- I. Evaluators did not conduct individual evaluation as per Regulation 16 (6) of the Procurement Regulations.*
- II. IEBC failed to conduct due diligence on a successful bidder even after reports of malpractice in Uganda by the same company.*
- III. Letters of notification of award to successful and unsuccessful bidders were not done on the same day as per Section 67(2) of the Procurement Act.*
- IV. Variation of contract by more than 10% was done in disregard of Regulation 31 of the Procurement Regulations.*
- V. Inspection and variation of the 34,600 devices was not done prior to deployment. This breached Regulation 17(3) of the Procurement Regulations.*
- VI. The Commission failed to adhere to technical advice to cancel the EVID tender before entering into contract. Face Technologies did not have the required infrastructure. This oversight on the part of IEBC largely led to the failure of the system.*

ETRS

- I. IEBC un-procedurally used quotations to procure 5,951 mobile phones at Kshs. 17,847,049.00 and audio-visual equipment at Kshs. 5,078,480. This was well above the Kshs. 1 million threshold for use of this procurement method.*

II. The Commission directly procured WAN connectivity from Safaricom Limited at Kshs.6,132,013 contrary to Section 74 of the Public Procurement and Disposal Act, 2005.

III. Further, the Commission made an irregular payment of Kshs.480,516 to Airtel Kenya Limited for services not rendered.

The Presiding Officers experienced difficulties transmitting results due to RTS server slowdown: The server originally procured for RTS was temporarily configured to be used in preparation of EVID data. This process ended two (2) days to the Election Day and was then configured for RTS. This left very limited time for adequate testing of the RTS server configuration. Consequently, the log file filled up the disk space allocated for RTS and stalled the system.

Training of the presiding officers was not adequate: Most of the mobile phones and SIM cards for Results Transmission were delivered after the training of the presiding officers had been concluded. Some constituencies received equipment on the night before the election. This meant that officers were not adequately trained on technology or where it was conducted it was not hands-on.

3.2.10. The **Petitioner** notes that as a result of **incompetence and internal operational inefficiency**, the IEBC Team failed to promptly complete the compilation of the final Principal Register of Voters, a key aspect of the electoral process in terms of citizens' constitutional rights and fundamental freedoms of participation and choice in the context of promoting electoral democracy in Kenya. This shortcoming on the part of the IEBC Team limited the duration for its public inspection of the Principal Register of Voters (PRV). As if that is not enough, training of registration staff by IEBC on the use of BVR was conducted for a very short period of **only four (4) days from November 12-17, 2012** through a methodology known as cascade training. These trainings were ineffective and more theoretical than practical given the shortage of training (BVR) Kits, with some regions and constituencies reporting only one kit for 10 trainees. The training appeared to focus on the end-users, whilst to some degree being neglected for support and oversight staff. The issue of **passwords that had expired**, which had been set during manufacturing process and related technical issues post great challenges to the ill-trained field staff and their seniors/ supervisors were helpless. This again consumed a week or so from the already constrained duration for voter registration. Indeed, **there is no evidence that there was any training provided for Constituency Election Coordinators (CECs) or Regional ICT staff who were the first point of contact in the event of issues being encountered during voter registration, which again points towards poor planning and incompetence on the part of the IEBC Team..**

3.2.11. The **Petitioner** further notes that upon compilation of the register, the IEBC opened it for inspection and rectification for a period of only 15 days instead of 30 days, thus on 4 January 2013 and completed this exercise on 19 January 2013. The compilation of the PRV was certified as complete on 18 February 2013 by notice in the Kenya Gazette, in leading daily newspapers and on the IEBC website, which was hardly accessible to civil society organizations, political parties, media, observers and other stakeholders in the electoral process. More so, the stakeholders had only 15 days or less to verify and authenticate the details in the Principal Register of Voters before the Election Day thus 4th March 2013. At this point, the indicated total number of registered voters in the BVR Register was 14,352,545, while the Special Register had 36,236 registered voters.

The PAC findings was that until the voters register was certified and gazetted on 18 February, 2013, there was no voters' register to migrate to EVIDs. After certification of the voters register, it was practically impossible to complete the data extraction and upload onto EVIDs, ten days to the election. This also hampered the training of IEBC staff on the use of the devices; some equipment came in as late as 28th February, 2013.

The Result Transmission System failed because a server dedicated to this exercise was not put to EVIDs use until three days to the General Election. This compromised test runs activities. Furthermore, the server still contained EVIDs data and this constrained partitioned space. This was fixed but some staff on the ground had already given up on electronic transmission and resorted to manual transmission. The late procurement of EVIDs had a general ripple effect on the effectiveness of the Results Transmission System.

The transfer of data from BVR to EVIDs began before certification was done. This was due to the pressure put by the Commission on the ICT directorate to perform. In some instances, there was discrepancy between the BVR and the EVIDs data.

3.2.12. The **Petitioner** observes that up-to now the IEBC Team is yet to clean the Principle Voters Register that was used in the 2013 general elections for the six elective positions in the Country. There were numerous discrepancies in the said Register as will be illustrated later with the judgment in the Senatorial ***Election Petition No.3 of 2013 filed by Musikari Nazi Kombo vs Moses Masika Wetang'ula and IEBC as the 2nd Respondent at the High Court of Kenya at Bungoma.***

3.2.13. The **Petitioner** states that because of internal incompetence and inefficiency and inability, the IEBC Team failed to create awareness among the stakeholders and voters through a comprehensive voter education programme on relevant voter information related to the elements of Kenya's Principal Register. This led to a lot of

suspicion and confusion among the stakeholders, especially the political parties and candidates who thought there were multiple registers deliberately created by the IEBC Team to rig the general elections. The key elements of Kenya's principal voters' register that the IEBC Team **failed** to disseminate to the stakeholders and the electorates were:

Biometric Voters' Register (BVR): contains all the voter registration information for a majority of the voters (over 14 million), including biometrics.

Special Register: contains all the voter registration information for approximately 36,000 voters, except biometrics.

Diaspora Register: contains all the voter registration information for voters registered in the Diaspora.

Green Book: The primary reference at registration; used by the IEBC as the reference of last resort after the massive and widespread failure of the Electronic Voter Identification Devices (EVIDs) in **over 60%** of the polling stations in the Country, further illustrating the incompetence and lack of preparedness on the Part of the IEBC Team.

3.2.14. The **Petitioner** further observes that as the electoral process moved towards conclusion, the IEBC's figures of the total number of registered voters were found to be very inconsistent, confusing and unconvincing to the stakeholders in the electoral process of 4th March 2013. Thus the numbers appeared to have either changed or had material miscalculations. For instance, on **9th March 2013**, the total number of registered voters at the end of the tallying of results was indicated as **14,352,533** (a difference of 12 voters). However, if the county totals are added up, the sum of all county totals comes to **14,349,896** (a difference of **2,649** voters). On **18 July 2013** the number had changed to 14,388,781 (a difference of 36,236 voters).

3.2.15. The **Petitioner** observes that in light of the requirements of the law and the fact that the registration process ought to have been concluded 30 days before the general election, these changing registration figures (and the IEBC's heavy reliance on the Green Book to justify huge variances in the figures) were vigorously argued as malpractices in the Supreme Court in *Raila Odinga vs The IEBC & Others*, and continues to cast a cloud of suspicion over the quality of the PRV and the competency of the IEBC Team that undertook the said registration process prior to the said general elections.

3.2.16. The **Petitioner** asserts that in reality, even if it is accepted that the BVR Register, the Special Register and the Diaspora Register are components of the Principal Voters' Register (PVR), the intention of the electoral law was that their contents should remain 'frozen' after it had been gazetted and should be the final roll call of voters and only reference point for the number of people who were eligible to vote.

3.2.17. Your Petitioner states that aforementioned discrepancies in the total number of registered voters further fortifies his argument that the IEBC Team was not only incompetent but also ineffectual and lacked the necessary capacity to fulfill its constitutional mandate and function of voter registration with regard to voter registration and hence should be dismissed from office. Resort to the Green Book further evokes memories of the former registration system, which used optical mark readers but also had a Green Book as a fall-back position. The Green Book cannot be trusted as the primary reference when there has been a sizeable investment in technology and the public has been assured all along that technology will provide safeguards against past inaccuracies in the voters' register. This is no way to build confidence in the accuracy of the register, a key confidence-building measure that is far from achieved.

3.2.18. Your Petitioner observes that the IEBC Team **failed** to ensure that an **accurate** and **verifiable** Principle Register of Voters (PVR) was prepared in good time and promptly shared/distributed political parties and others to the stakeholders in the electoral process. In this respect the IEBC Team could not therefore certainly and accurately and certainly determine all those who were eligible to vote in the 4th March 2013 General Elections. This explains why there were variations and discrepancies in the number of registered voters in the Principal Voter Register, as highlighted earlier in this Petition under Paragraph 2.5.14. The performance of the IEBC Team with regard to its function of voter registration raised more questions than answers about the **credibility of the PVR** and **capacity** of the IEBC Team to carry out a seamless voter registration exercise as stipulated in **Articles 82 & 83** of the Constitution of Kenya 2010 and the Elections Act 2011.

3.3. Incompetence of the IEBC Team manifested in the irregularities and malpractices during voting 4th March 2013, contrary to the provisions of Article 86 of the Constitution of Kenya 2010;

3.3.1. The **Petitioner** observes that the Constitution of Kenya 2010, IEBC Act 2011 and the Elections Act 2011 grant the IEBC vast powers over conducting and managing elections as witnessed in the 4th March 2013. According to Article 86 of the Constitution of Kenya; *at every election, the independent Electoral and Boundaries Commission shall ensure that-*

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

3.3. 2. Your Petitioner states that credibility of the IEBC's Results Tallying and Transmission Systems in the 2013 general elections raised more questions than answers. This in turn tainted its public image and eroded its integrity as an impartial and credible Electoral Management Body. The negative perception continues to haunt the members of IEBC and its management day by day. It requires urgent self introspection and souls searching on their part, individually and collectively as to whether their continued stay in office is tenable anymore.

3.3.3. Your Petitioner states that the IEBC Team failed to effectively, accurately and promptly process and transmission the results of the six seats in the general elections of 4th March 2013 as stipulated in Article 86 of the Constitution of Kenya 2010. This notwithstanding the deployment of a strong and expensive work force of permanent and temporal staff to the tune of about 300,000 in all the 33,400 or so polling stations, 290 constituencies and 47 counties in the Country. The break down was as follows:

- 33,400 Presiding Officers supervised counting at the polling-station level, completed statutory forms 34, 35 and 36 and announced polling station results and relayed provisional results to the IEBC headquarters tallying centre.

- 290 Returning Officers aggregated and announced members of the National Assembly, county assembly members and the votes for the other seats.
- 47 County Returning Officers aggregated and announced governors, senators, county women representatives and votes for the presidential election. IEBC headquarters announces winner of the presidential election.
- IEBC national tallying centre through its Chairman announced winner of the Presidential Election and other presidential candidates in the 4th March 2013 general elections.

3.4. Your Petitioner states that despite a generally good image when it was established, riding in part on the public approval ratings of its predecessor, the Independent Interim Electoral Commission (IIEC), the IEBC briefly ran into a number of credibility and integrity challenges; its public approval ratings, in various public opinion surveys conducted by the Kenya National Dialogue and Reconciliation Monitoring Project and others, dipped irreparably up to now as will be illustrated by various memorandums, media statements and pronouncements by leaders and stakeholders across the political, religious, civil society and geographical divides. There were a number of ***institutional and operational challenges*** which *negatively impacted on the **competence, efficiency and effectiveness** of the **IEBC Team** and subsequently eroded its **integrity and public confidence/trust*** in the run-up to and following the March 2013 general elections. The most significant of the management shortcomings and challenges which compounded IEBC Team's to incompetence and loss of integrity were:

- Perennial and protracted wrangles between the commissioners, especially the Chairman Ahmed Isaack Hassan and management led by the then Commission Secretary, James Oswago;
- Weak enforcement of the election laws, especially the electoral code of conduct and electoral offences provisions of the elections act 2011;
- Uncertainty over the election date that eventually moved to court for hearing and determination;
- The controversial and late acquisition of the Biometric Voter Registration (BVR) kits and the Electronic Voter Identification devices(EVIDs) ; and
- Delays in the promulgation of election regulations.

3.5. The Petitioner observes that some of the aforementioned shortcomings, challenges and inadequacies of the IEBC Team continue to date, and new ones have since arisen based on developments since the 2013 general elections and the current electioneering mood in the Country which has not only politicized and heightened political temperatures but also eroded public confidence and trust in the Commission. These has in turn blurred the image of an independent, impartial, fair and credible Electoral Management Body and polluted the electoral environment for effective and efficient management of the forthcoming general elections by the IEBC team as currently constituted.

3.6. **Your Petitioner** maintains that all the aforementioned aspects constitute the main grounds of incompetence and lack of integrity that are discussed in details in several paragraphs of this Petition. It can not be over emphasized in this context that the IEBC Team not only failed to assert its independence in the 2013 general elections , but also did not fully appreciate, internalize and operationalize the immense constitutional mandate, powers and functions of a strong and independent electoral management body (EMB) envisaged by the framers of the Constitution of Kenya 2010. Indeed, the IEBC Team as currently failed to rise to the occasion and/ or occupy its powerful and rightly position as stipulated in various provisions of the Constitution of Kenya and its enabling legislations. The petitioner shall later on revisit, broaden and fortify his premise and argument in the context of this Petition.

3.7. **Your Petitioner** observes that the IEBC Team before and during the 2013 general elections ***operated on a very weak, contradictory, antagonistic, polarized and incompetent internal governance structures*** with two competitive axis or centres of power. The **first axis** comprising of the Chairman, some commissioners and staff. The **second axis** was composed of the former Secretary of the Commission, some commissioners and staff. This ***cold war like*** scenario was experienced before, during and to some extent after the general elections of 4th March 2013. Soon after the IEBC commissioners were appointed and sworn into office in November 2011, they organized a strategic planning retreat with management to plan for the forthcoming elections and to discuss other aspects of the newly established Electoral Management Body (EMB's) mandate and functions. According to media reports and informed internal sources that do not wish to be disclosed or be seen discussing fellow commissioners and staff, towards the end of that retreat, the current Chairman informed his fellow commissioners at a Commission meeting in the coastal region that the IEBC needed to appoint a Commission Secretary – in the meantime, the incumbent would be designated Acting Commission Secretary. For many observers, this was a continuation of the controversy

between the chairperson's office and the Commission Secretary's in the last days of the IIEC. The IEBC proceeded to advertise for a Commission Secretary and two deputies. The matter eventually went to court and a voter obtained an injunction against the IEBC's recruitment of a new Commission Secretary, pending determination of the suit. This particular case is still pending in the high court awaiting hearing and determination.

3.8. The Petitioner notes that the IEBC proceeded with the appointment of two deputies, pending determination of the suit regarding the Commission Secretary. While the IEBC kept a public image of unity and many of its officials stated categorically that the matter had since been buried, it is possible that it was merely a microcosm of governance issues that created suspicion and mistrust among commissioners and staff galvanized around the current Chairman and the former secretary, who operated two parallel centres of power within the Electoral Management Body. This phenomenon continues to plague the IEBC's unity of purpose in diverse ways and may, in fact, mask broader board and management separation issues. One would argue that those wrangles have since been sorted out after the suspension and eventual sacking of the former Secretary James Oswago, but he has his strong allies and sympathizers in the name of some commissioners and staff in the management and in the 17 regions and 290 constituencies. There is a need for parliament to reflection on how to strike a balance between the executive powers of full-time commissioners, the responsibilities of the Chief Electoral Officer/Commission Secretary and the rest of the secretariat in day-to-day administration.

3.9. Your Petitioner's anonymous interviews with representatives of IEBC at both levels of Commissioners and Staff reveal that:-

- *It is still not clear what the dividing lines are between the policy and administrative domains.*
- *There are no institutionalized guidelines for how to manage this separation.*
- *There is no common understanding of the core processes of delivering free, fair and transparent general election because of the current fear and uncertainty among most commissioners and staff of the emerging negative perceptions and violent protests and anti- IEBC debates in the media and public fora by leaders across the political and religious divides. This is fertile ground for the kind of conflicts that have sometimes flared up, as well as the managerial stasis that sometimes sets in when staff is not sure if they will be accused of crossing the policy line or survive the envisaged vetting.*

3.10. Your Petitioner is of the view that in order to strengthen the governance structure of the future Electoral Management Body, there is need for National Assembly and Senate could consider:-

- Expending more effort on reinforcing board–management separation;
- Having an even smaller number of commissioners (say, three or five maximum) who will focus more on policy issues; or
- Having all or some of the commissioners serve part-time. Inadequate electoral law enforcement capacity.

3.11. Your Petitioner states that the IEBC Team as currently constituted lacks the competence, capacity and integrity to eliminate electoral offences and malpractices in the forthcoming general elections, as was recently witnessed in the two by elections in Malindi and Kericho, respectively. Indeed, given the nature of Kenya's electoral process, the said by-elections have had claims of irregularities, with claims and counter claims of irregularities and electoral malpractices across the political divide. This has further cast doubt about the competence, preparedness and ability of the current IEBC Team to effectively deal with electoral offences in the next general elections. For instance, on one hand, the Ruling Jubilee Coalition claimed that IEBC rigged the by elections in **Malindi** in favour of the Opposition Candidate sponsored by ODM and by extension the CORD Coalition. On the other hand the Opposition Party KANU and its newly found allies in CORD Coalition claimed that the same IEBC rigged the **Kericho** Senatorial Elections in favour of the Jubilee Coalition Candidate. In this regard, both sides of the political divide have continued to express their reservations and doubts about the competence, ability and capacity of the current IEBC Team to guarantee this Country free, fair, peaceful and credible general election.

3.12. Your Petitioner further states that IEBC and its sister agency, office of the Registrar of Political Parties have failed to regulate the unpatriotic and undisciplined behaviour of some members of political party who in one way or the other compromises or erodes the credibility of the electoral process Political parties have also had controversies relating to the changed allegiance of some of their elected members without suffering the consequences of by-elections as provided for in law – chiefly by publicly supporting others without writing letters of resignation to the Speaker of the National Assembly or the Senate. Legally, these members should be deemed both by

their parties and the Registrar of Political Parties (RPP) and IEBC to have resigned in accordance with the provisions of Section 14(5) of the Political Parties Act, 2011, but this has not been the case. Instead, the RPP has sought a legal opinion on the issue from the Attorney-General, while there are a number of pending cases in the courts on the matter. This seeming weakness in enforcing electoral law has raised doubts on the IEBC's ***competence and integrity to deal with law-breaking by political parties and their members.***

3.13. Your Petitioner maintains that IEBC lacks the **competence and capacity** to deal with electoral offence relating to bribery and treating in the past and future general elections and by elections. That despite the enactment of the Election Campaign Financing Act, its mere passage does not inspire public confidence in the IEBC's ability to rein in wayward political parties and aspirants or candidates. It will be encouraging and inspiring public confidence if at all many of electoral offenders in the 2013 and subsequent by elections were heavily punished by the IEBC Team as a deterrence measure. Unfortunately, since most electoral offenders, especially high profile political leaders were not arrested and prosecuted by IEBC in 2013 and the said by elections, most stakeholders are apprehensive that IEBC does not have the competence and capacity to deal with such violations and that may be business as usual in the next general elections, if at all the current IEBC is allowed to preside over the general elections.

3.14. Your Petitioner observes that the enforcement of nomination procedures in the 2013 general elections was also somewhat hampered by the IEBC Nominations Disputes Committee's overlapping mandate and functions with the Political Parties Disputes Tribunal (PPDT) and the courts. Another area in which the IEBC has experienced challenges was the promulgation of election regulations on the electoral process generally.

3.15. Your Petitioner asserts that despite the fact that the law requires regulations to be adopted by Parliament before they become law; the IEBC had not delivered the draft regulations to the relevant Committee of Parliament six days to the original deadline. Parliament had to demand delivery in strong terms, following which the regulations were tabled by the Minister for Justice, National Cohesion and Constitutional Affairs. The Election (Amendment) Act, following a Bill by the Chairman of the Constitutional Implementation Oversight Committee, saved the day by extending the time for the promulgation of the regulations. The IEBC eventually submitted the election regulations, as amended and approved by Parliament, to the Government Printer for publication on

2 November 2012. While this ended the process of promulgating the Election (General) Regulations, 2012, the Election (Registration of Voters) Regulations, 2012, and the Election (Voter Education) Regulations, 2012, it is a stark reminder of the extent to which it is likely that the IEBC was incompetent as manifested in its inability able to discharge its obligations within the statutory deadlines. As the next general elections are going to be such high-pressure, high stakes event and time-sensitive events, just like the 2013 were, this is very worrying practice on the part of the Electoral Management Body.

3.16. Your Petitioner observes that the IEBC's weak capacity to enforce the law and its own regulations is in part a reflection of its vulnerability to the influence of and manipulation by political parties. Not only is this evident from the manner in which the RPP handled political parties flouting the Political Parties Act in the transition period, but also in the ***incompetent manner in which the IEBC handled the nomination of special seat representatives before and after the 2013 general elections***. There was subsequently court action on the nominated members of county assemblies, in addition to the nomination of candidates for the direct elections before the general election and nominated members of the National Assembly and Senate. The IEBC Team subsequently received some public condemnation for these irregularities, which adds to its general incompetence and integrity shortcomings with the rest of the electoral process.

3.17. Your Petitioner states that the IEBC team through its Chairman has reportedly opined that some of the commission's failures and shortcomings in the 2013 general elections may have been due to the logistical challenges of running six elections simultaneously. While this seemed to make some sense, but in the absence of a well reasoned opinion that weighs this supposed benefit against the likelihood of at least doubling or tripling high electoral costs, it is not readily apparent that this will necessarily lead to an improvement in the IEBC's performance.

3.18. Your Petitioner observes that because of incompetence and lack of human capacity, ***IEBC failed to apply and or utilize its prosecutorial powers donated to it from Article 157*** of the Constitution of Kenya 2010, with regard to election offenders. As indicated elsewhere in this Petition, the IEBC even tried in the 2013 general elections to put together a fledgling investigative and prosecution team to enable it to discharge this mandate. Its output from the 2013 elections, compared to all the allegations of malfeasance, is nevertheless not apparent and this in itself illustrates the

fact that the current IEBC has no capacity and competence to engage in prosecution as stipulated in the elections Act 2011 and its amendments.

3.19. Your Petitioner further states that either way, the IEBC and Kenya's response to electoral malpractices and/ or offences is not strong enough to send a clearly deterrent message to would-be election offenders about the cost of committing electoral crimes. Insufficient electoral transparency and accountability Electoral transparency was one of the weakest aspects of Kenya's electoral process in the 2013 general elections.

2.10. Your Petitioner observes that the spirit and the letter of the Constitution of Kenya was to establish a strong, independent, transparent and accountable electoral management body that will guarantee this country free, fair, peaceful, transparent and accountable electoral process and credible election results as part of its goal of creating, nurturing and sustaining electoral democracy in a multi-party political environment. . . Ironically, transparency and accountability of IEBC to its stakeholders, especially political parties and civil society seems to have weakened with the advent of a stronger Electoral Management Body anchored in various provisions of the Constitution of Kenya 2010 and the electoral laws. Indeed, *IEBC was opaque in terms of making public the results of many of its electoral exercises, including its new technologies such as BVR, EVID and Results Transmission System (RTS). This in turn led to increased suspicion and mistrust of the IEBC Team and its results for the 2013 general elections, especially in the presidential results transmission process.*

3.20. Your Petitioner asserts that for the sake of integrity and credibility, it was not enough for the IEBC Team to have publicly projected the results on large screens as they come in 2013. The IEBC failed to have all the critical information in the election results audit trail publicly available to enable its accuracy and the absence of fraud to be ascertained. There is currently some disquiet over the fact that the 2013 general election results are still not publicly available, amid claims that the IEBC cannot account for disproportionately large discrepancies (some media reports put them at close to a million votes) between the vote tallies in the presidential and other elections and that this has, among others, affected the distribution of the monies due to political parties from the Political Parties Fund.

3.21. Your Petitioner further asserts that the tendency of the current IEBC to be opaque, defensive and over reactive on issues pertaining its competence and ineffective performance in the 2013 general elections is not just an image issue or mere negative perception for the IEBC, but could potentially reduce its integrity and public confidence in both the IEBC and the Supreme Court (depending on how it handles any dispute emanating from such controversy). Election results are such an important part of the reform of the Country's electoral process that stakeholders and electoral analysts should not be second-guessing the Electoral Management Body or deriving their accuracy from survey methodology such as the parallel vote tabulation employed by the Local Domestic Election Observers Group (ELOG). That one of the important things that would have helped restore public trust is the IEBC's final results in a form that would have put all electoral stakeholders at the same level in terms of the primary data, and in a form that opens up the results processing system and its products to independent verification. To this end **IEBC Team terribly failed** in its Results Transmission System (RTS), which left the stakeholders doubting the authenticity of the results that were released after the complete breakdown of the said technology. Coupled with the delay in producing the results, and the already swirling rumours about the discrepancies in the result tallies, further eroded public faiths in the IEBC as currently constituted.

4. 0. Your Petitioner asserts that IEBC's incompetence was manifested in its failure to regulate political parties during nominations and campaigns of 2013, contrary to the provisions of Articles 88(4) (d), 91 and 92.

4.1. Your Petitioner states that IEBC is also mandated by law to establish the Political Parties Liaison Committee (PPLC). A strong and vibrant PPLC would have not only been a useful forum for consultation with political parties, but would also help to defuse tensions in the process by dealing with critical challenges from a broader perspective through consensus-building. While the Political Parties Act, 2011, envisages an independent Registrar of Political Parties (RPP), not subject to the control or direction of any person or authority, this legislation is relevant to the IEBC in two ways. In the first instance, a substantive RPP is yet to be appointed, meaning that the previous RPP appointed under the Political Parties Act, No. 10 of 2007, is still acting as such in line with the transitional provision in section 51 of the Political Parties Act, 2011.

4.2. Your Petitioner notes the fact that political parties are critical actors in the electoral process, and the inclusion of the IEBC in the PPLC means that the electoral Management Body will still have the function of maintaining dialogue with political parties and the RPP even after a substantive RPP is appointed and the new legislation

is fully operationalized. Such dialogue will be critical in ensuring political parties understand their rights and responsibilities in the electoral process are aware of major decisions in the electoral process and contribute to the IEBC's decisions on major electoral issues.

4.3. Your Petitioner states that the spirit of the Elections Act 2011 with regard to PPLC is that political parties are as subject to the law and to the IEBC's directions as any other stakeholder in the electoral process. They nevertheless enjoy a special place in the scheme of things since the law requires the establishment of the PPLC as a formal forum for dialogue and consultation with political parties. The IEBC Team and the RPP failed to establish a strong PPLC before and after the 2013 general elections. The two institutions also **failed** to regulate the manner in which political parties conducted their party nominations for the 2013 general elections and subsequent by elections.

4.4. Your Petitioner observes that political party nominations are another source of concern and a manifestation of IEBC's incompetence and lack of integrity. The party nominations for the 2013 general elections were a serious affront to the Country's multiparty system and its electoral democracy. The political parties were not only chaotic but also patently undemocratic, quarrelsome, and in some places even violent. However, because of incompetence and lack of integrity, the IEBC did not put in place administrative mechanisms to supervise these nominations in accordance with the law and there is indeed doubt over whether, given all the imperatives of organizing a successful general election, this supervisory function of the IEBC over political parties will ever be exercised in the next general elections, especially in the context of complex general elections such as those held on 4th March 2013.

4.5. Your Petitioner observes that the IEBC may have an administrative reason for not supervising the political parties nominations in 2013, since it simply did not have enough staff to do so, but it seems that *ex post facto* supervision in the form of holding political parties to account for the manner in which they followed their nomination rules and providing directives on fair nomination processes may be of some help. This is what the IEBC Election Disputes Tribunal did when it heard 120 nomination-related cases in the run-up to the last general election. However, the short time set aside for the hearing and determination of disputes created a situation in which some political parties and candidates felt that they did not get substantive justice from the IEBC Team.

4.6. IEBC incompetence as manifested in its failure to execute its Voter Education mandate function stipulated in article 8(4) g of the Constitution of Kenya 2010;

4.6.1. Your Petitioner states that IEBC failed to out comprehensive voter education and adequate voter information dissemination as required by the Constitution and the Elections Act 2011. The IEBC, civil society and the media the relationship between the IEBC and civil society is seen in the context of election observation, discussed below, and the discharge of the IEBC's voter education mandate. The latter was critical, especially given the relative complexity of holding six elections on one day. In this respect the IEBC published guidelines and regulations on voter education and accredited voter education service providers. However, the IEBC did very little to provide technical and financial assistance as well as monitor the implementation of voter education by the accredited civil society organizations. The IEBC failed to carry out quality control and moderation of the materials used despite the fact that it had published a standard curriculum on Voter Education with the help of the Kenya Institute for Curriculum Development. The number of spoiled and rejected ballot papers and irregularities on the statutory forms shows that there was limited voter education and training of election staff to be able to effectively supervise, manage and monitor the complex electoral process and its newly introduced technologies..

4.6.2. Your Petitioner asserts that there was poor working relationship between some IEBC staff and the civil society organizations with regard to Voter education. This problem persisted late into the electoral cycle, with some IEBC staff members challenging the notion that any other civil society or agency could play the role of providing voter education. As a result, the IEBC originally intended to conduct voter education (largely funded by donors) on its own, but eventually changed its approach and sought civil society assistance in the delivery of voter education, albeit much later than would have been the case if a collaborative approach had been adopted from the start.

4.6.3. Your Petitioner observes that after launching Voter Education in October 2012, it was not until after the Stakeholders' Conference in February 2013, that IEBC felt the pressure and handed responsibility for delivery to Civil Society Organizations (CSOs). The indecisiveness and laxity on the part of the IEBC Team resulted in critical delays in the implementation of voter education and also have limited the programme's overall reach and impact. Generally, CSOs appeared to be asking for greater engagement with the IEBC and its leadership, while the Commission's leadership seemed to view this as high maintenance (that is, too involving). In this regard, the CSOs wanted high-level engagement with commissioners, while the commissioners had other pressing priorities and therefore delegated the CSO engagement to the IEBC staff.

4.6.4. Your Petitioner states that the CSOs interpreted this as the IEBC's indication that CSOs and their issues were a lower-order priority to the IEBC's top leadership. In its final report, the Election Observation Group decried the lack of 'effective communication and information-sharing' by the IEBC. Ultimately, a compromise between these two extremes will be necessary, based on further consultations and agreement on the structure of the IEBC's relationship and collaboration with CSOs generally. The IEBC used the media to inform the public on key stages of the electoral process. There were, however, two shortcomings in its media use:

- The first was the failure to effectively manage expectations. Many pundits questioned why the IEBC had to communicate a target for its voter registration drive, yet the previous register had been discredited. This begged the question of what the IEBC was basing its estimates on. It would probably have been wiser to just promise to register 'as many eligible voters as possible'.
- Secondly, at the height of the BVR controversy, the IEBC seemed to have totally lost its public communication strategy, giving rise to the entrenched public belief that all was not well and, ultimately, that it had been salvaged by the executive. Overall, the IEBC failed to read the public mood and expectations in the 2013 general elections and this partly explains the growing voter apathy in the Country. The media itself was criticized for not asking the IEBC tough questions or revealing malpractices out of fear of stoking tensions similar to those related to the post election violence.

5.0. IEBC Shortcomings in the facilitation of Election Observation and Monitoring mandate and function under Article 88(4) h

5.1. Your Petitioner states that the Constitution of Kenya and the Elections Act 2011 now recognizes monitors and requires the IEBC to provide regulations for their work. In reality, however, there is some distinction between election observation, election monitoring and election supervision. The mandate of election observers is to gather information and make an informed judgment without interfering in the process. The mandate of election monitors is to observe the electoral process and to intervene if laws are being violated. Election supervisors certify the validity of the electoral process. The IEBC contends that it is the supervisor, only political parties should monitor, and observers should observe.

5.2. Your Petitioner states that in the run-up to the general election, ELOG called for more structured dialogue and consultation with the IEBC, which was virtually absent. Specifically, what the observers were demanding was a well-structured accreditation process, comprising monthly meetings with the IEBC leadership, and IEBC attendance of their events to provide clarifications. The ELOG did not have unfettered access to

information it considered public, such as the voters' register in machine-readable format. The observers from ELOG and other observer groups were denied a list of polling stations until much later in the day. The **IEBC accreditation procedures cumbersome**. There was denial of access to observers in some stations even though an oath of secrecy was not necessary for observers. The Africa Centre for Open Governance (AfriCOG) and Law Society of Kenya observers also reported some access and facilitation challenges. Many observers have taken issue with the fact that the tallying centre was out of bounds from the second day and that party agents were thrown out of the tallying hall at one point and were told that the area was a 'security zone'. The question was also asked why IEBC gave the international observers were given voters' register earlier than domestic observers.

6.2. Your Petitioner highlights some of the events that raised questions about IEBC's competence and integrity in the 2013 General elections.

- The server processing the provisional results crashed on election night;
- Engineers replaced its hard disks;
- By then the returning officers had decided to physically deliver the results to Nairobi;
- There were network issues in some areas (yet mobile telephone networks Safaricom and Airtel could not communicate on the same platform to provide the necessary redundancy);
- Some phones (e.g. in Mombasa) were not configured; and
- Information technology staff explained the difficulties using vocabularies, which did not help.
- The upshot, though, is that this was the beginning of the erosion of confidence in the results. The delayed release of the final results months after the elections (and in a form that can withstand public audit or scrutiny) still raises questions about the IEBC's transparency and accountability to the voting public, if not its overall competence as an Electoral Management Body.