



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**CONSTITUTIONAL PETITION NO 555 OF 2012**

**JOHN HARRISON KINYANJUI.....PETITIONER/APPLICANT**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup>  
RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE HON. CHIEF JUSTICE.....3<sup>RD</sup> RESPONDENT**

**THE REGISTRAR OF PERSONS.....4<sup>TH</sup> RESPONDENT**

**REGISTRAR GENERAL OF BIRTHS AND DEATHS.....5<sup>TH</sup> RESPONDENT**

**AND**

**THE PUBLIC PROCUREMENT AND OVERSIGHT AUTHORITY.....1<sup>ST</sup> INTERESTED  
PARTY**

**CANADIAN COMMERCIAL CORPORATION.....2<sup>ND</sup> INTERESTED  
PARTY**

**SAFRAN MORPHO.....3<sup>RD</sup> INTERESTED PARTY**

**KENYA BUREAU OF STANDARDS.....4<sup>TH</sup> INTERESTED PARTY**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....5<sup>TH</sup> INTERESTED  
PARTY**

**RULING**

**Introduction**

1. The Petitioner/Applicant, John Harrison Kinyanjui is a registered voter in the pre-existing Voter's Register maintained by the 1st Respondent. He filed the petition dated 3rd December 2012 alleging that his rights as an elector and voter as provided for by **Article 38(2) and (3)** of the Constitution as well as his freedom of expression and opinion as expressed by **Article 32 and 33** the **Constitution** have been

violated. He also alleges that the Respondents with the connivance of some of the Interested Parties have violated his rights to free, fair, transparent, secure, verifiable, accountable and a simple election as envisaged by **Article 81** and **86** of the **Constitution**.

2. Together with the Petition he filed a Notice of Motion Application dated the same date. At the hearing of the Motion on 11th January 2013, the Petitioner abandoned prayers 11, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22, and so this Ruling is therefore in respect of the remaining prayers which are as follows;

a) *Pending the hearing and determination of the Petition herein, a mandatory order do issue directing the 1st respondent IEBC to bar from nomination, presentation of the name or names for inclusion in the ballot papers for the March 4th 2013 elections any person candidate, or nominee who campaigns or conducts any form of political camping seeking to be elected or nominated in the said March 4th 2013 elections conducting such campaigns in a religious sanctuary, during a religious meeting, or burial ceremonies anywhere within the Republic of Kenya.*

b) *Pending the hearing and determination of the Petition herein, a mandatory order do issue to compel the 1st and 2nd Respondents herein to issue a directive within 48 hours of the making of this order to the vice President, all Cabinet Ministers, Prime Minister, Deputy Prime Ministers, and all State officials conducting campaigns for the March 4th 2013 elections as such to forthwith cease and desist from further or at all using Government vehicles and Government resources in their ongoing campaigns for the March 4th 2013 elections, in violation of Section 43(1)(d) of the Elections Act, 2011.*

c) *Pending the hearing and determination of the Petition, an injunction order do issue restraining the 1st Respondent IEBC from tendering for, purchasing or otherwise procuring translucent ballot boxes for the conduct of the March 4th 2013 elections.*

d) *Pending the hearing and determination of the Petition, a mandatory injunction do issue, compelling the 1st Respondent IEBC to lawfully procure transparent ballot boxes as defined in Section 2 of the Elections Act, 2011, for the conduction of the March 4th 2013 elections.*

e) *The 1st Respondent IEBC be compelled by a mandatory injunction to forthwith expunge from its list of voters as set out in its Principal Register of Voters all deceased persons so far remaining thereon and certified by the 5th Respondent herein. The Registrar General of Births and Deaths as recorded in the said 5th Respondent's statutory monthly and annual records of deaths in the Republic of Kenya pursuant to Section 7 of Cap 149 of the Laws of Kenya.*

f) *A mandatory injunction do issue to compel the 1st Respondent IEBC to forthwith (and not later than 3 days from the making of this order) furnish the Petitioner with a list of all foreign nationals whose services it has procured for and in preparation of the March 4th 2013 elections, now currently so engaged, specifying their nationality, role over the contracted period, and term of employment and/or attachment and/or volunteerism of such foreign nationals.*

g) *The costs of this Motion be to the Petitioner/Applicant in any event.*

### **Petitioner/ Applicant's case**

3. Mr. Kinyanjui claims that pursuant to the provisions of **Article 81** of the **Constitution**, the 1st Respondent (IEBC) is mandated to conduct the 4th March 2013 elections in a transparent manner. He however alleges that IEBC intends to conduct the said election by means of less than transparent ballot boxes that are a recipe for rigging and stuffing of ballot papers. He states that under Regulation 61(2) of the Elections (General) Regulations 2012 published by the 1st Respondent vide Legal Notice No. 128 of 2012, the IEBC has purported to legislate that the ballot boxes necessary for the conduct of the 4th March 2013 elections are to be '**fairly transparent or translucent**'. He thus contends that this prescription is ambiguous and does not guarantee a transparent election on 4th March 2013 contrary to the provisions of **Article 81 (e) (iv)** and is *ultra vires* section 2 of the Elections Act, 2012 which defines a ballot box as a transparent container.

4. He claims that the IEBC has not offered any explanation to warrant it to use translucent ballot boxes. He alleges that the translucent ballot boxes would impede, rather than enhance or demonstrate the transparency tenet espoused of an election under **Article 81 (e)(iv)** of the **Constitution**. He thus submits that Regulation 61(2) of the Elections (General) Regulations is unconstitutional and ought to be quashed or amended to align with the spirit of **Article 86(a)** of the **Constitution**.

5. He further claims that the 1st Respondent is in breach of **Article 10(2)** of the **Constitution** as it has failed to observe the rule of law in the run up to the 4th March 2013 election for various reasons *inter alia* that; under Regulation 60 of the Elections (General) Regulations, IEBC ought to conduct the forthcoming election by electronic means but it has failed to publish through electronic and print media of national circulation guidelines to apply in such voting. It thus contends that in the absence of such regulations, any conduct of the elections in an electronic manner will be arbitrary, unfair and illegal and in the circumstances, IEBC ought to be restrained. Further, that the Chief Executive Officer (CEO) of the 1st Respondent is improperly in office and that it has failed to appoint such an officer using lawful means. Also that IEBC has breached the provisions of **Article 232(1)** and **(2)** of the **Constitution** because it has procured goods such as BVR kits and election materials contrary to the procurement law and mandate of the 1st Interested Party and that it failed to subject the BVR kits to pre-shipment inspection and certification by the 4th Interested Party, Kenya Bureau of Standards to guarantee and insure their fitness for purposes of a credible election.

6. The Petitioner further claims that IEBC has not enforced paragraph 6(d) of the Electoral Code of Conduct embedded within the 2nd Schedule of the Elections Act, 2012 which prohibits a candidate from campaigning for the 4th March elections in a religious sanctuary or during burial ceremonies. He thus submitted that the 1st Respondent must be compelled to call adherence to this law.

7. The Petitioner further contends that the State Officials are using government vehicles and resources in their ongoing campaign thus gaining improper influence which is in breach of **Article 81 (e) (ii)** of the **Constitution** and **Section 43** of the **Elections Act, 2011**.

8. The Petitioner also claims that the IEBC has not exhibited its independence as the Executive has on various occasions dictated to it on the conduct of its affairs particularly and especially in the procurement of the BVR kits from the 3rd Interested Party and procurement of laptop from an American corporation, DELL INC, without ascertaining that those laptops were from spying software intended to surreptitiously control conduct of 4th March elections. It is his contention further that the DELL INC laptops will result in long queues because they have a 2GB SDRAM instead of the 4GB RAM requested for by the IEBC, and the anomaly will result invariably to the postponement of elections for a possible three days which is against **Articles 101(1), 136(1)** and **180(1)** of the **Constitution** that elections shall be held in one day. He also claims that these BVR kits have not been certified by the 4th Interested Party, Kenya Bureau of Standards as having passed the test of fitness for the purpose of transparency in the elections.

9. He further alleges that the sharing of information supplied via the BVR kits or AFIS e-voting system breaches his right to privacy during voting since SAFRON-MORPHO agents and DELL INC can readily link his ballot to him contrary to Section 60(2) of the Elections Act, 2011. He thus claims that the e-voting system cannot meet the constitutional threshold that demands a system that will yield reliability, credibility, privacy, democracy, verifiability and a recount in the event of any dispute over tallied votes.

### **1st Respondent's case**

10. In reply to the Application, the 1st Respondent filed an affidavit sworn by Mohamud Mohamud Jabaneon, its Legal Manager on 7th December 2012. It also filed grounds of opposition dated 18th December 2012.

11. It also filed Grounds of Opposition dated 18th December 2012 and the 1st Respondent urged me to dismiss the Application with costs for failing to disclose any cause of action and for what it termed as being merely speculative.

12. The 1st Respondent also claimed that Article 81(e)(iv) of the Constitution does not demand the use of transparent ballot boxes but demands that there be a transparent electoral system. It relied on the case of James *Omingo Magara v Manson Onyango Nyamweya & 2 Others, (2010) e KLR* where the Court of Appeal held that under the Former Constitution, there was an implied obligation to conduct transparent election. It thus avers that the Petitioner has failed to demonstrate how the use of fairly transparent or translucent ballot boxes would result in a non-transparent election. It further claims that the Petitioner has not proved that the 1st Respondent has indeed procured translucent rather than transparent ballot boxes. In any case, Mr. Munge for the 1st Respondent assured the Petitioner that, IEBC will procure ballot boxes that meet the constitutional and legal requirements and added that unless it is proved that the 1st Respondent has breached its duty under the Constitution, its conduct left to speculation. It was his submissions that this Court cannot anticipate actions of a statutory body or impose its interpretation unless it is demonstrated that the body has acted unconstitutionally. The 1st Respondent referred the Court to the decision of *Michael Wachira Nderitu & 3 Others v Mary Wambui Munene & 2 Others Petition No. 549 of 2012* in support of that proposition. In any event, the 1st Respondent submitted that Regulations 67 and 79 have ensured transparent elections as they deal with the issue of inspection and sealing of ballot boxes.

13. In response to the allegation that Regulation 61(2)(a) of the Regulations (*which provides for use of fairly transparent ballot boxes*) is inconsistent with section 2 of the Election Act (*which provides for use of transparent boxes*), Mr. Munge claimed that Regulation 61(2)(a) is not ultra vires the Election Act as claimed because Article 82 of the Constitution requires a transparent election and the Constitution at Article 82 (1) (d) mandates Parliament to enact a legislation to provide *inter alia* for the '**conduct of elections and referenda and the regulation and efficient supervision of elections and referenda...**'. Section 2 of the Election Act defines a ballot box generally whereas Regulation 61(2)(a) stipulates that every ballot box shall be '**fairly transparent or translucent.**' It was thus his submissions that Regulation 61(2)(a) does not breach Article 82(1)(d) of the Constitution because it is enacted pursuant to the provisions of the Constitution, and he called upon me to be guided by Article 259 of the Constitution which demands that in interpreting the Constitution, the Court should promote its purposes, values and principles and that the Constitution shall be construed according to the doctrine that the law is always speaking.

14. Mr. Munge submitted that this Court cannot usurp the role of the 1st Respondent in the process of nomination of candidates by barring persons who use state resources in their campaigns or who conduct campaigns in religious sanctuaries or burial ceremonies from presenting nomination papers for various elective posts. He relied on the case of *Michael Wachira Nderitu & 3 Others v Mary Wambui Munene & 2 Others (supra)*, where this Court held that it had no jurisdiction to deal with matters of nomination of candidates for elective office as that was the mandate of the IEBC. In addition, while calling for such a bar, the Petitioner cannot rely on newspapers as evidence since they have no probative value. In any event, that the Petitioner failed to state specifically the officers in question and the said officers have not been subject to this proceedings and it is trite law that orders cannot issue against a person who is not a party to a suit.

15. With regard to the issue of the illegal procurement of the BVR kits and fear that they may malfunction, Mr. Munge contended that there is a clear legal procurement framework which was properly invoked by IEBC and this Court is not the proper forum for determining this Petition. In any event, the issue of procurement has been overtaken by events as the BVR kits have already been procured and the registration process successfully completed.

16. In the end, Mr. Munge urged me to dismiss the Application and find that together with the Petition it lacks merit since both are based on unsubstantiated assumptions or speculations that are entirely wrong, in any event.

#### **The 2nd, 3rd, 4th and 5th Respondents case**

17. Mr. Njoroge for the 2nd, 3rd, 4th and 5th Respondents associated himself with the submissions made by Mr. Munge, but added that there was no complaint made with regard to the use of state resources in

campaigns and so the Application is speculative.

18. All the Interested Parties failed to file any response to the Application.

### **Findings**

19. The facts of this application are uncontested. I am called upon to *inter alia* interpret Regulation 61 (2)(a) of the Elections (General) Regulations 2012 and section 2 of the Election Act, 2011 with regard to the ballot boxes to be used in the 4th March 2013 election. The issue thus is, whether Regulation 61 (2)(a) in calling for the use of 'fairly transparent or translucent' ballot, boxes is in contravention of section 2 of the Election Act, 2011.

20. The Constitution at Article 81(1)(d) provides for a transparent election. This Article provides that;

**“81 (1) The electoral system shall comply with the following principles-**

...

**(e) Free and fair elections, which are-**

**(iv) Transparent' ...**

Similarly, Article 82 (2) stipulates that the legislation to be enacted under sub-article one shall ensure that voting at every election is transparent. It provides that;

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

**(a) simple;**

**(b) transparent; and**

**(c) .....**

21. Clearly, the Constitution has not stated specifically that ballot boxes ought to be transparent. This requirement can be said to emanate from the provisions of the Election Act, 2011. That Act is enacted pursuant to the provisions of Article 82(1)(d) of the Constitution which provide that;

**(1) Parliament shall enact legislation to provide for—**

**(a) the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;**

**(b) the nomination of candidates;**

**(c) the continuous registration of citizens as voters;**

**(d) the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including the nomination of candidates for elections; and**

**(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote.**

The object and purpose of the Election Act, 2011 is stated in its preamble as,

**'An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, County Governor and County Assembly; to provide for the conduct**

**of referenda, to provide for election dispute resolution and for connected purposes'.**

22. Section 2 defines of the Act then a ballot box as a; **'transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period'** (Emphasis mine).

On the other hand, Regulation 61(2) of the Elections (General) Regulations 2012 states that;

**' 2 Every ballot box shall be-**

**(a) fairly transparent or translucent'.** (Emphasis mine)

These Regulations are subsidiary legislation enacted under the Elections Act.

23. The Petitioner is now apprehensive that the 1st Respondent is likely to use 'fairly transparent or translucent ballot boxes as provided for by Regulation 61(2) instead of a 'transparent container' as defined by section 2 of the Elections Act.

24. The 1st Respondent has assured the Petitioner that it is alive to its constitutional and statutory duty of carrying out a transparent election and will duly comply with the law.

25. The Petitioner's concern with regard to the use of either a *“transparent or fairly transparent or translucent”* ballot boxes, is in my view adequately answered by Mohamud Mohamed Jabane, the 1st Respondent's Legal Manager who stated under oath that the 1st Respondent will duly comply with the law.

26. Ordinarily, I would have left the matter at that point, but some aspects of the law above has caused me some discomfort. As much as I agree with the 1st Respondent that there is yet no breach of the provisions of the law as regarding the use of 'transparent' ballot boxes as defined by section 2 of the Elections Act, and whereas there is no controversy or dispute before me, I must state the obvious inconsistencies between Regulation 61 (2) and section 2 of the Election Act.

27. I am alive to the provisions of Section 31 of the Interpretation and General Provisions (Cap 2) which provide that subsidiary legislation shall be consistent with the provisions of an Act. Section 31 (b) provides thus;

**'No subsidiary legislation shall be inconsistent with the provisions of an Act'.**

Regulation 61(2) having been made under the Elections Act is necessarily a subsidiary legislation and ought to supplement the Act and not contravene any of its provisions. Section 29 of the Interpretation and General Provisions Act provides that;

**“Where an Act confers power to make subsidiary legislation, expressions used in the Subsidiary legislation shall, except where a contrary intention appears, have the same respective meanings as in the Act conferring the power, and a reference in the subsidiary legislation to 'the Act' shall mean the Act conferring the power to make the subsidiary legislation”.**

28. “Transparent boxes” cannot mean the same thing as fairly transparent or translucent. Mr. Kinyanjui very dramatically and with good effect, tabled before the Court two samples of transparent and translucent plastic papers . They are certainly differed in terms of transparency and the translucent one is less transparent. In fact the Oxford English Dictionary defines “translucent” as “semi-transparent” and “transparent “ is defined as *“allowing light to pass through so that objects behind can be distinctly seen.”* Where the Act creates a certain condition of the ballot boxes but the Regulations create a different condition, the Court must intervene, Mr. Kinyanjui complaint is clearly valid. Accordingly, I direct the 1st Respondent, the enacting authority to move with speed and revisit Regulation 61(2) of the Election (General) Regulations 2012 and rectify the anomaly. In so holding, I am further fortified by section 29 as

stated above and 31(c) of the Interpretation and General Provisions Act which states that;

**'subsidiary legislation may at any time be amended by the same authority and in the same manner by and in which it was made ....'**

29. I now turn to the other issues as raised by the Petitioner especially with regard to the allegation that State Officers have been campaigning using state resources and also that the 1st Respondent was not independent in the procurement of the BVR kits. Mr. Njoroge submitted that no complaints were made in respect of those issues and that there is no dispute in place. I agree with Mr. Njoroge in that regard. And I hasten to remind the Petitioner who is an advocate of this Court this court has no jurisdiction to deal with hypothetical and abstract issues. This Court can only exercise its jurisdiction in the context of a real dispute and not on speculative issue. This was the finding in; *John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011* where the court stated thus;

**'We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum. We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.'**

30. Furthermore, even if there were complaints lodged in regard to the issue, this Court can still not issue the orders so sought because it would be usurping the role of the 1st Respondent which has the exclusive mandate of determining the qualification and disqualification of a candidate. I am alive to the reasoning of this Court in *Francis Gitau Parsimei and Others v National Alliance Party and Others (2012) eKLR*; and the Court of Appeal in *Narok County Council v Transmara County Council (2000) 1 EA 161*, where the Court of Appeal held that a party had to follow procedure provided by the law before it could resort to court of law. This was also the holding in *Speaker of the National Assembly v Karume (2008) I KLR 425*, where the court stated as follows;

**'in our view, there is considerable merit in the submission that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....'**

31. With regard to the issue of BVR kits and voter registration, I take judicial notice that, the voter registration process has long been concluded and the 1st Respondent is preparing for the elections which are less than one week away. It is trite law that Courts cannot injunct that which has already taken place.

32. In light of the foregoing, the Application must fail except on one issue.. The Petitioner might well argue that this is a public interest litigation, but I must state that in bringing matters such as this, it is not enough to make bare statements without addressing oneself to the manner in which any Constitution violation has occurred.

33. The final orders are that whereas the Application stands dismissed, I direct the 1st Respondent to revisit Regulation 61(2) and rectify the obvious contradiction with Section 2 of the Elections Act and retain the language of the Act that ballot boxes shall be transparent.

34. As to costs, let each party bear its own costs.

35. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF FEBRUARY, 2013**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

*Irene – Court Clerk*

*Mr. Kinyanjui present*

*No appearance for Respondent*

**Order**

*Judgment duly delivered.*

**ISAAC LENAOLA**

**JUDGE**

**Order**

*Petition shall be heard on 12/3/2013 at 11.00 a.m.*

*Notice to issue.*

*Copies of Ruling to be supplied.*

**ISAAC LENAOLA**

**JUDGE**