



**REPUBLIC OF KENYA**  
**IN THE REPUBLIC OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 104 OF 2013**

**SAMSON OWIMBA OJIAYO.....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION(IEBC).....1ST RESPONDENT**

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

**REASONS FOR DECISION**

1. On 1st March 2013, I delivered a Ruling in this matter in which I dismissed the Notice of Motion dated 13<sup>th</sup> February, 2013 and reserved the reasons for the said decision. I did so because of exigencies of time and the urgency involved in the determination thereof. Herebelow are the reasons for the dismissal of the Motion;

2. The same is supported by the Petitioner's affidavit in which he seeks to have IEBC, the 1st Respondent herein disqualify certain election observers from taking part as such during Kenya's March 4th, 2013 General elections accusing them of partisanship. According to the pleadings, the Petitioner is "persuaded that these entities cannot possibly be objective or even keen to observe the benchmarks set in the Declaration of Principles for International Election observation..."

3. The Petitioner bases his claims on the notion that the international observers from countries the United Kingdom, United States of America and the European Union have openly declared bias against the election of some candidates in the March 4th General elections. He argues that by exhibiting open partisanship, the entities have breached Regulation 94(2) of the *Elections (General) Regulations, 2012* which requires international observers to be bound by internationally accepted best practices for elections.

4. The Petitioner also seeks the court's intervention to forbid the conduct of exit polls as this, according to the Petitioner is an express breach of the law and the voiding of the tenet and principle of the secrecy of the ballot. He offers that exit polls conducted elsewhere, invariably involve the interrogation of electors such as the Applicant on their secret ballot cast, and this would infringe upon the integrity of

the lectroral process.

5. The main prayers sought by the Applicant therefore are the following;

*(a) That Pending the hearing and determination of the application, a conservatory order by way of a mandatory injunction do issue, to compel the 1st respondent, IEBC to within 24 hours of the making of the order, to formally disclose to the Applicant the full list of;*

*(i) All accredited short term election observers accredited to it for the March 4th 2013 elections as at January 30th 2013; and*

*(ii) All accredited long term election observers accredited and registered as such with it for the March 4th elections as at June 29th 2012.*

*(b) That pending the hearing and determination of the Petition, a conservatory order do issue to prohibit the 1st Respondent IEBC from recognizing, accepting for short term accreditation for purposes of observing the March 4th 2013 elections*

*(c) Pending the hearing and determination of the application, a conservatory order by way of a mandatory Order do issue, compelling the 1st Respondent IEBC to cancel and revoke the short term and/or long term accreditation of the UK, US and European Union Election Observers Missions, for being partisan in their role as such election monitors and acting in breach of Kenya's sovereignty and democratic right of the Petitioner.*

*(d) Pending the hearing and determination of this application, a conservatory order by way of injunction do issue against the 1st Respondent IEBC compelling it to restrain any person, including its accredited short term or long term observers from conducting any exit polls at any or all Gazetted polling stations in Kenya for the March 4th 2013 elections which exit polls are in breach of section 60 of the elections act, 2011.*

6. The Independent Electoral and Boundaries Commisison (IEBC) opposes the Motion on the basis of a Replying affidavit sworn by **Mohamud Mohamed Jabane**, the Manager Legal Services of the IEBC and the Supplementary Affidavit deponed by **Moses Kipkogei** its Senior Legal Officer, as well as the written submissions on record.

7. Mr Lubullelah, counsel for the IEBC submitted that **Section 63(1)(b)** of the **Elections Act** refers to violence, deception, and trickery and the impediment of voting but has nothing to do with exit polls being an undue influence which is the essence of **Section 63(1)(b)**. Counsel submitted that exit polls are not undertaken by election observers and there is in fact no evidence that they are planning exit polls save for newspaper cuttings showing that such exit polls are being undertaken. Mr. Lubullelah dismissed such press statements as lacking evidential value; in any event.

8. It was further submitted on behalf of IEBC that **Section 42** of the **Elections Act** gave IEBC the mandate to accredit media and observers and that the words used is 'may' which means it is merely permissive and that if no observers existed, elections would still continue. Under **Section 94** of the **Elections (General) Regulations, 2012**, the IEBC is empowered to revoke accreditation of any observer if it is satisfied with material before it that the observer partisan. Stating that freedom of expression extended to foreigners including observers, counsel observed that in this case, no names of partisan observers had been given.

9. The IEBC also maintains that the decision to remove observers lay within its discretion and not the courts or the Applicant. Mr. Opondo for the Attorney General expressed similar sentiments and re;uing on Grounds of opposition dated 20<sup>th</sup> February, 2013, he stated that **Article 88** of the Constitution mandated IEBC the independent authority to conduct elections and referenda including accreditation of observers and the court's have no reason to be involved in that process.

10. Counsel further stated that under **Section 39(2)**, of the Elections Act before determining the final results, the IEBC could announce the provisional results of an election which are not akin to exit polls. The Respondents in the end urged me to dismiss the Motion with costs.

### **Determination**

11. The IEBC is an independent body established under **Article 248(2) (c)** of the Constitution and as an independent Commission and as such, in the performance of its functions the Commission is not subject to control or direction from any person or authority, including the Court. **Article 249(2)** of the Constitution lays emphasis on this independence devoid of any direction or control from any other person. The IEBC must be given discretion to assess the situation and intervene when in a particular situation demands such intervention. It is not for this court to compel the independent Commission to flex its muscles and exercise discretionary powers and least of all dictate to it when and how it is to flex those muscles.. **Section 42** of the **Elections Act** and **Regulation 94(4) of the Elections(General) Regulations** specifically give the IEBC discretion in carrying out accreditation of election observers.

12. Further, Under **Article 88(4)** of the Constitution, the IEBC is the responsible body for conducting or supervising referenda and elections to any elective body or office established by the Constitution in the country. Under **Article 88(4)(h)** and **Section 42** of the **Elections Act**, it is the body tasked with the facilitation of the observation, monitoring and evaluation of elections. It is also the sole body mandated to announce election results under **Article 86** as read with **Section 39** of the Elections Act. The latter provision reads thus;

***39. (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.***

***(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.***

***(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.***

13. **Regulation 94** of the **Elections (General) Regulations, 2012** expounds on the discretion of the IEBC on accreditation of election observers in the country in the following terms:

***“94. (1) Pursuant to section 42 of the Act, the Commission may, at any election, accredit any person or organisation to observe the elections.***

***(2) The Commission shall issue guidelines for election observers, consistent with internationally accepted standards for fair elections, and which shall be binding on election observers upon accreditation by the Commission.***

***(3) Without prejudice to the generality of sub-regulation (2), the guidelines issued there under may specify the procedures for the accreditation of election observers.***

***(4) The Commission may revoke the accreditation it has granted to any election observer where it is satisfied that an election observer is partisan or has violated any requirement of the guidelines referred to in sub regulation (2).***

***(5) No person or organisation may observe any election unless the person or organisation has been accredited by the Commission.***

***(6) All the accredited election observers shall submit to the commission a written report in accordance with the guidelines issued by the commission in subregulation (2).*** The law above speaks for itself and needs no more than a literal interpretation.

14. In the absence of demonstration of violation of threatened violation of the fundamental rights and freedoms or breach of the law, this court cannot interfere with the discretionary mandate of IEBC and purport to step into the shoes of the IEBC. As this court stated in the case of **Wamwere v Attorney General**[2004] 1 KLR;

***“...I see no need to seek leave that a public officer should be compelled to do something when there is no evidence of refusal or at the very least apparent refusal on the part of the public officer to do the thing. Even if such refusal had been shown, it must also be shown to be unlawful. Sadly, in this case, neither has been shown.”***

15. I still reiterate that position. In **International Centre for Policy and Conflict and 5 others v Attorney General and 4 others, Petition 552 of 2012**, the court remarked as follows regarding the independence of the constitutional bodies;

***“ An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. ”***

16. I accept this reasoning and would only quickly add that I have not been shown that the IEBC has failed to adhere to any law nor that it has failed to discharge a specific mandate as required of it or infringed upon any fundamental right of the Applicant or any other Kenyan voter. The Petitioner has no concrete evidence to support his claims of impartiality. He only makes casual reference to some newspaper clips and has assumed that the court will rely on them and move it to grant drastic reliefs in the form of mandatory and injunctive orders against the Respondent.

17. As the court has held in the past, newspaper articles fall short of the evidential value required especially amidst heavy allegations such as those advanced by the Petitioner. As was stated in **Okiya Omtatah Okoiti v Attorney General and another, Nairobi Petition No. 311 of 2012**,

***“There is now a contract between the Government of Kenya and the Canadian Corporation and the IEBC which gives rise to rights and obligations between the parties. This court cannot give orders that would interpose these relationships without hearing all the parties thereto much less on the basis of some allegations of fraud gleaned from newspaper articles.(See also Provincial Insurance Co. of East Africa v Mordecai Nandwa, Kisumu Civil Appeal No. 179 of 1995(unreported).”***

18. The Petitioner suspects and as he puts it is 'persuaded' that these observers are unlikely to be partisan. He however has failed to persuade the court but better still, the IEBC, which is the body with the mandate on facilitation of election observers that his position is based on fact. The Petitioner's allegations might well be true or not but as far as I am concerned, those allegations based on suspicions and sepculations which fall a yardstick away from the purview of this courts's scrutiny which is that of determining real disputes. I must emphasize that courts will only concern themselves with real issues of controvesies.

As the court stated in **International Centre for Policy and Conflict v Attorney General, Nairobi Petition 398 of 2012**,

***“In the case of Republic v Truth Justice and Reconciliation Commission and Another ex parte Augustine Njeru Kathangu and Others Nairobi Misc. App. No. 490 of 2009 (Unreported) the court held that Article 22 as read with Article 258 obliges every applicant to clearly set out the acts and/or omissions that, in his or her view, contravene the Constitution and also specify the provisions of the Constitution that those acts or***

*omissions contravene and the prayers or reliefs he or she seeks.*

The court in this case concluded that;

***“The questions framed by the parties raise important and fundamental issues about our electoral process but the Court cannot act in the absence of a real dispute between the petitioner and the respondents.”***

I wholly agree and adopt these sentiments.

19. Moreover, and on this one I agree with the position preferred by the Respondent, the Petitioner has made allegations that affect third parties and now wishes the court to make drastic orders that will adversely affect those Parties without them being enjoined to this matter and given a chance for their voice to be heard on the allegations. Observers, whether local or foreign, just like any other Kenyan, are entitled to protection of their fundamental rights and freedoms. A court of justice cannot proceed in the manner suggested by the petitioner. This is one such court. (See **Michael Francis Chemonges v Independent Electoral and Boundaries Commission, JR Misc. 41/2013.**)

20. The Petitioner has complained that the conduct of exit polls interviews will likely compromise on the principle of secret ballot. On that issue, I have this to say;

First, we do not have legislation governing exit polls in the country and second, just like in the first issue of impartiality it is by itself speculative in nature as there is no evidence or guarantee that such exit polls will actually take place and even if they do, as to what form they will likely take. This court cannot hasten into the future and forecast events then proceed to grant anticipatory or contingent orders. The courts are not short of matters dealing with present real controversies as to spare judicial time to pull such an exploration.

21. The issues raised by the petitioner are not idle but without real evidence before the court, they remain in the realm of conjecture.

22. The upshot of this is that this Petition fails dismally and is one beckoning for dismissal and it is so dismissed. I may have erroneously indicated orally that the Applicant may be entitled to costs. That was a statement in error.

23. Each party to bear its own costs.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 8TH DAY OF MARCH, 2013**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – Court Clerk*

*Mr. Lubullelah for Respondent*

*No appearance for Petitioner*

**Order**

*Reasons delivered.*

*Copies to be delivered to parties.*

**ISAAC LENAOLA**

**JUDGE**

**8/3/2013**