



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civil Appli 415 of 2007

IN THE MATTER OF: THE ELECTORAL COMMISSION OF KENYA

E MATTER OF: THE CONSTITUTION OF KENYA

**IN THE MATTER OF: THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 AND THE
EXCHEQUER AND AUDIT ACT CAP 412 AND REGULATIONS ADE THERE UNDER**

**IN THE MATTER OF: APPLICATION NO.20 OF 2007 THE PUBLIC PROCUREMENT
COMPLAINTS REVIEW AND APPEALS BOARD**

BETWEEN

PRINTING INDUSTRIES LIMITED

AND

THE ELECTORAL COMMISSION OF KENYA

**IN THE MATTER OF: AN APPLICATION UNDER SECTION 3, 65(2),67 41(1) & (9), 42a, 72,
84, 123(8)**

OF THE CONSTITUTION OF KENYA

THE ELECTORAL COMMISSION OF KENYA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL

THE PUBLIC PROCUREMENT

COMPLAINTS REVIEW AND APPEALS BOARD....2ND RESPONDENT

PRINTING INDUSTRIES LIMITED.....3RD RESPONDENT

JUDGMENT

The applicant the Electoral Commission of Kenya (ECK) has filed an Amended Originating Motion

dated 4th May 2007 seeking principally interpretation to the effect that the ECK functions and rights have been infringed by the enactment of the provision of the Public Procurement and Disposals Act 2005. The Public Procurement and Disposals Resolutions 2006 and the Exchange and Audit (Public Procurement) Regulations 2001.

The Applicant by a Tender No ECK/11/2006-2007 dated 11th September, 2006 invited tenders for the printing and supply of badges, forms, stickers, posters, manuals and booklets. ECK contends that the said materials are essential for registration of voters, carrying out of elections and voter education, as mandated by Section 42A of the Constitution of Kenya. The tender was awarded on 29th November 2006 to the successful tenders. On 22nd March 2007, the 3rd Respondent who was an unsuccessful tenderer filed Application No 20 of 2007 before the Public Procurement Complaints Review and Appeals Board challenging the award of the Tender. The application before the Board had been set down for 19th April 2007 but this court granted interim relief to ECK by stopping the hearing pending the determination of this Motion.

Section 41(9) of the Constitution of Kenya gives autonomy to the ECK in that it provides that, in exercising its function under the Constitution ECK shall not be subject to the directions of any person or authority. The functions of ECK under S 42 A are:-

- (a) The registration of voters and the maintenance and revision of the register of voters
- (b) Directing and supervising the Presidential National Assembly and Local Government elections
- (c) Promoting free and fair elections
- (d) Promoting voter education throughout Kenya
- (e) Such other functions as may be prescribed by law

The applicant, the Electoral Commission of Kenya seeks the following orders through the Amended Originating Notice of Motion.

1. A declaration that the Electoral Commission of

Kenya's responsibilities under Section 42A of the Constitution includes invitations for the tenders for printing and supply of badges, forms stickers, posters, manuals, booklets, ballot papers and other electoral materials.

2. A declaration that Tender No.ECK/11/2006-2007 was valid and in compliance with the Electoral Commission of Kenya's responsibilities under Section 42A of the Constitution.

3. A declaration that Regulation No.2 of the Exchequer and Audit (Public Procurement) Regulations, 2001 made by the Minister of Finance under Section 5A of the Exchequer and Audit Act Cap 412 of the Laws of Kenya of Kenya and published by Legal Notice No.51 of 2001 defining procuring entities as public entities undertaking procurement in so far as it relates to The Electoral Commission of Kenya is ultra-vires section 41(9) of the constitution.

4. A declaration that regulation No.2 of the Ex-Chequer and Audit (Public Procurement) Regulations, 2001 made by the Minister of Finance under Section 5A of the Exchequer and Audit Act Cap 412 of the Laws of Kenya and published by Legal Notice No.51 of 2001 in so far as it purports to put The Electoral Commission of Kenya under the purview and control of the regulations of the Exchequer and Audit Act Cap 412 of the Laws of Kenya with regard to procurement is ultra-vires Section 41(9) of the Constitution.

5. A declaration that Section 3(c) of the Public Procurement and Disposal Act, 2005 defining procuring entities as including all the Commissions established under the Constitution and which commissions

include The Electoral Commission of Kenya is ultra-vires Section 41(9) of the Constitution.

6. A declaration that Section 3(c) of the Public Procurement and Disposal Act, 2005 in so far as it seeks to bring the operations of The Electoral Commission of Kenya with regard to its procedures of the Procurement of services and goods under the ambit of the section and the entire provisions of the Public Procurement and Disposal Act, is ultra-vires Section 41(9) of the Constitution.
7. A declaration that Section 25(1) of the Public Procurement and Disposal Act, 2005 and Regulation No.41 of the Exchequer and Audit (Public Procurement) Regulations, 2001 under the Exchequer and Audit Act Cap 412 of the Laws of Kenya published by Legal Notice No.51 of 2001 establishing the Public Procurement Complaints, Review and Appeal Board in so far as it relates to The Electoral Commission of Kenya is ultra-vires Section 41(9) of the Constitution.
8. A declaration that Public Procurement and Disposals Regulations 2006 made under Section 140 of the Public Procurement and Disposal Act, 2005 and published by Legal Notice No.174 in so far as it relates to The Electoral Commission of Kenya is ultra-vires section 41(9) of the Constitution.
9. A declaration that regulations 40,41 and 42 the Exchequer and Audit (Public Procurement) regulations, 2001 purporting to give Administrative powers to the Public Procurement Complaints, Review and Appeals Board over The Electoral Commission of Kenya are ultra-vires Section 41(9) of the Constitution.
10. A declaration that The Electoral commission of Kenya's right to personal liberty as guaranteed under Section 72 of the Constitution of Kenya has been, is being and is likely to be contravened by Sections 2,3,25(1), 40,41 and 42 of the Public Procurement and Disposal Act, 2005 Regulation No.41 of the Exchequer and Audit (Public Procurement) Regulations, 2001 under the Exchequer and Audit Act Cap 412 of the Laws of Kenya published by Legal Notice No.51 of 2001 and the Public Procurement and Disposals Regulations 2006 made under Section 140 of the Public Procurement and Disposal Act, 2005 and published by Legal Notice No.174.
11. A declaration that the Public Procurement Complaints, Review and Appeal Board has no jurisdiction to entertain try and or determine Application No.20 of 2007 filed by Printing Industries Limited against The Electoral Commission of Kenya.
12. A declaration that application No.20 of 2007 filed by Printing Industries Limited against The Electoral Commission of Kenya violates S 41(9) of the Constitution.
13. A direction to the Chairman of the Public Procurement Complaints, Review and Appeal Board to strike out Application No.20 of 2007 filed by Printing Industries Limited against The Electoral Commission of Kenya with costs.
14. This Honourable Court do make, issue, and give such further other and consequential orders writs and directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 41(9) and 42 A read with Section 123 (8) of the Constitution.

The application is based on the following grounds.

- i. The Electoral Commission of Kenya is a creature of the Constitution pursuant to the provisions of section 41 of the Constitution of Kenya.
- ii. The functions of the Electoral Commission of Kenya are set out under the provisions of sections 42A of The Constitution of Kenya.
- iii. In Performance of the said functions The Electoral Commission of Kenya by virtue of Tender No.ECK/11/2006-2007 dated 11th September, 2006 invited tenders for printing and supply of badges, forms, stickers, posters, manuals and booklets for the period up to 31st December, 2007 of Tender

No.ECK/11/2006-2007 dated 11th September, 2006 invited tenders for printing and supply of badges, forms, stickers, posters, manuals and booklets for the period up to 31st December, 2007.

iv. The bids were opened on 11th October 2006 and the decision of the Tender Committee was made on 29th November 2006.

v. The successful tenderers have to date substantially performed their contracts and supplied the materials required from them.

vi. On 22nd March 2006 application No.20 of 2007 was filed by Printing Industries Limited against the Electoral Commission of Kenya before the Public Procurement Complaints, Review and Appeals Board challenging the award of the tender.

vii. The consequence of the application is the violation of the applicant's fundamental right to its functions as set out under the Constitution.

viii. Regulation No.2 of the Exchequer and Audit (Public Procurement) Regulations, 2001 made by the Minister of Finance under Section 5A of the Exchequer and Audit Act Cap 412 of the Laws of Kenya and published by Legal Notice No.51 of 2001 defines procuring entities as public entities undertaking Procurement and that includes The Electoral Commission of Kenya.

ix. Section 3(c) of the Public Procurement and Disposal Act, 2005 and Regulation No.41 of the Exchequer and Audit (Public Procurement) Regulations, 2001 under the Exchequer and Audit Act Cap 412 of the Laws of Kenya Published by Legal Notice No.51 of 2001 establishes the Public Procurement Complaints, Review and Appeal Board to determine all matters relating to procurements done by the public entities including The Electoral Commission of Kenya.

x. Section 25(1) of the Public Procurement and Disposal Act, 2005 and Regulation No.41 of the Exchequer and Audit (Public Procurement) Regulations, 2001 under the Exchequer and Audit Act Cap 412 of the Laws of Kenya published by Legal and Appeal Notice No.51 of 2001 establishes the Public Procurement Complaints, Review and Appeal Board to determine all matters relating to procurements done by the Public entities including The Electoral Commission of Kenya.

xi. Regulations 40,41 and 42 the Exchequer and Audit (Public Procurement) regulations, 2001 give Administrative powers to the Public Procurement Complaints, Review and Appeal Board over the public entities including the Electoral Commission of Kenya.

xii. Section 41(9) of the Constitution specifically provide that the Electoral Commission of Kenya in exercising its functions under the Constitutions shall not be subject to the direction of any other person or authority.

xiii. Section 123 (8) of the Constitution specifically provides that it is only the court which has the powers to entertain any question relating to the exercise of the powers of The Electoral Commission of Kenya in exercising its functions under the Constitution.

xiv. The Public Procurement Complaint, Review and Appeals Board is not a court.

xv. The Powers given to the Public Procurement Complaints, Review and Appeals Board over the Electoral Commission of Kenya by virtue of regulations 40, 41 and 42 the Exchequer and Audit (Public Procurement) regulations, 2001 are ultra vires section 41 (9) of the Constitution.

xvi. The Application No.20 of 2007 filed by Printing Industries Limited against The Electoral Commission of Kenya is a violation of the Constitutional right of the Applicant.

ECK's contention is that the specified Regulations are ultra vires S 41(9) of the Constitution in so far as

they are made to apply to the ECK. The Board which is appointed by the Minister under section 5A of the Exchequer and Audit Act Cap 412 exercises quasi judicial power and this it cannot do over the activities of ECK in view of S 41(9) and S 123 (8) of the Constitution since the Tribunal is not a court. In other words the principal question is whether the powers donated to the Public Procurement Review Board are ultra vires Section 41(9) of the Constitution of Kenya.

The Court finds that the issue of whether the Board is a court was not in serious contention in that even its name does suggest that it is not a court in terms of S 65 of the Constitution or any other written law.

I find that procurement is central to the exercise of ECK powers pursuant to S 41(9) and in the exercise of its powers, it enjoys autonomy subject to S 123 (8) of the Constitution and since the Review Board is not a Court it cannot lawfully exercise its power on the ECK. I find and hold that the exercise of any power by the Board is ultra vires section 41(9) and S 123 (8) of the Constitution and therefore Regulations 40,41 and 42 are ultra vires and void in relation to ECK only. For the avoidance of doubt the Regulations are lawful as regards any other specified public entities.

However the autonomy of the ECK is not absolute in that S 123 (8) of the Constitution provides that any question relating to the exercise of the powers of the ECK can only be entertained and determined by the court. ECK therefore contends that the Board established under Regulation 41 of the Exchequer and Audit (Public Procurement) Regulations 2001 is not a court and the Public Procurement and Disposal Act 2005 stipulate that the ECK is one of the public entities which can be challenged before the Board as per regulation 42. The Boards powers include annulling a tender.

I must however at the outset stress that this application does raise wider issues. The first question is – is the ECK constitutionally obligated to be transparent and accountable and if so to whom? The answer to this question is “yes” for the reason that the democratic provision section 1A of the Constitution does in my view require that all public institutions and entities are accountable to the people they serve, because in a democracy they owe their power and their existence to the need to serve the people. Section 1A embodies the ideals and values of a democratic society and I dare say accountability is one of the values to be inferred. It is so because it is an offspring of the wider concept of the doctrine of separation of powers which in turn is the cement or the thread that joins together the three arms of Government, namely the Legislature, Executive and the Judiciary. Separation of powers is the unbroken thread and a noticeable pattern in the entire framework of our Constitution. In this regard the court would be perfectly entitled to infer under Section 1 A of the Constitution any generally accepted ideals and values of a democratic society.

Section 1 A embraces all that it takes to run and manage a democratic society and not specifically expressed elsewhere – traditions, usages, customs, conventions, practices and procedures which define make and enhance democratic values and ideals.

As held by a Constitutional Court in the *LEMUGURAN CASE Misc Civil Application No. 305 of 2004* the provisions which define the mandate of the ECK namely S 42 A and S 41 of the Constitution should be read together with this democratic provision. The ECK is part of the whole. All public bodies and institutions except for reasons of national security or defence are required to be transparent and accountable. They do not however have personal rights of their own except those that assist in the discharge of their constitutional or statutory mandate although it is conceded that they are “persons” pursuant to S 123 of the Constitution. For example they could assert freedom of expression in order to explain their role in the society. The ECK cannot however claim the rights Mr Onsando has asserted in this matter except their autonomy and the need to have a flexibility that enables the ECK to fully discharge its constitutional mandate.

In my experience, the position of public bodies and their responsibilities has never been put in clearer words than in the case I have cited in two of my recent decisions, namely R v SOMERSET (1995) QBD 523 where at page 524 the Court stated:-

“But for public bodies the rule is opposite and so of another character altogether. It is that any

action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealing constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose.

“But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in the sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them”.

I am happy to note that ECK is not resisting accountability at all. On the contrary it is fighting for autonomy which will at any given time enable it to perform its constitutional mandate. I find, hold and declare that it is entitled to such autonomy but it must be an autonomy with responsibilities, which include accountability. ECK’s accountability is owed to:

- Parliament – through the relevant Committees
- Judiciary – under the Constitution as stipulated and the judicial review jurisdiction
- Controller and Auditor General – through Audits
- Executive – through the Exchequer Act, in so far as if the Act and the Rules do not interfere with ECK’s operational, budgetary ad financial independence.
- Can sue and be sued especially in contract in so far as tenders are concerned
- Scrutiny by the Fourth Estate – the Media

The court does commend the ECK through its counsel, for explaining that it has adhered to all the other Procurement Regulations save those impugned in this judgment. For this reason I find no serious challenge to the 2006 Regulations since under Regulation 64 the ECK can apply to have special rules tailored to suit its constitutional autonomy.

ANALYSIS, ISSUES, FUNDINGS AND HOLDING

I do not uphold the preliminary objection to the amended application because the parties had agreed to have it heard on merit instead of entertaining any interlocutory applications. In addition in constitutional matters a court should be fairly broad and liberal in upholding the right of access to court which I have in the past held to be fundamental right as well.

It is however not clear why section 84 was invoked at all in the circumstances of this case. The matter does not fall under any of the Chapter 5 Protective Provisions of the Constitution and for this reason I uphold the objections raised by the Attorney General and the interested parties Counsel. The invocation of S 84 is therefore disallowed. The ECK has no personal rights only a constitutional duty.

It is obvious to the Court that S 41(9) of the Constitution does not provide procurement as one of the functions of the Electoral Commission of Kenya. However I believe the ECK has been able to establish the following:

- 1) That under the impugned Act and Regulations the Procurement Review Board, is a tribunal not a court of law, and that it has powers to annul a tender issued by the ECK and that the annulment could in turn trigger a complete stoppage or temporary delay of the work of the Commission for example printing posters for voter education or for the printing of materials required in a by-election or even a General election – a situation which ECK has powerfully argued, encroaches on its autonomy as expressed in the Constitution. It has also established, I believe that a decision of the Procurement Board encroaches on its

right of autonomy because such a decision could adversely affect its programme for the management of elections and related matters – thereby causing serious disruption or delay. The ECK has also argued that the Procurement Board’s decision is a form of unconstitutional control of the ECK.

2) The ECK has been quick to point out or clarify that it fully understands the objectives of the Procurement laws and Regulations and that in filing this matter it is not in any way seeking exemption from the principle of transparency and accountability. The ECK case is that any accountability processes applied to it should not have the effect of either diminishing, impairing or interfering in any way with its autonomy with possible consequence being delay in implementing its constitutional responsibilities.

3) The points raised above by the ECK have a very firm practical and constitutional basis because accountability in Government can assume different forms and it is also evident from the examination of the impugned laws and Regulations that the Minister for Finance can make different regulations for different public entities. Thus, the law empowers the Minister to make regulations which suit the special needs of certain public entities including the ECK. In the case of the ECK, the special needs include the need to safeguard and uphold its operational autonomy.

4) I find nothing in Chapter 7 provisions, which mandate the Finance Minister to encroach on the ECK autonomy under S 41(9) and I do overrule both Counsel for the interested party (IP) and the Attorney General who have argued that I should invoke the “spirit” of that Chapter. My finding on this is that such “spirit” must spring from the provisions of the Constitution themselves and cannot be imported from outside. I find no such spirit in the Finance provisions. However I do find the spirit to be transparent and accountable in the democratic provision of the Kenya Constitution namely S 1A of the Constitution. The Section reads:

“The Republic of Kenya shall be a multiparty democratic State”

The reason for inferring such a spirit pursuant to S 1A of the Constitution is that when a country declares in her Constitution that it is a democratic state it announces to its citizens and the world that it shares some internationally recognised ideals and values that are embraced by other democratic states. S 1A in my view embodies the general spirit of the Constitution and the Constitution is in turn designed to maintain and promote the ideals and values of a democratic society. The interpretation of the Constitution has to develop in tandem with the changing ideals and values, and the pace of their development. S1A demands that when interpreting the Constitution there must be a deliberate search for a fair balance between the demands of the general interest of the society and the rights of the individual or the rights vested in governmental agencies, commissions or parastatals. In the case in question the fact that the ECK draws moneys from the Consolidated Fund comes with the responsibility to account for such funds because in a democracy all public entities notwithstanding their autonomy must have a responsibility to account.

It would not be right for the ECK as a public authority to seek autonomy without accountability. Happily, it has not sought to do so in this case. Indeed it is a philosophy of public administration, that public authorities and their employees hold information or wield the power vested in them as servants of the people. Public servants or public officers shall therefore advance the public interest, not obfuscate or deny it.

The idea behind autonomy is good governance, and is better manifested by the buzzwords of accountability and transparency. Both are concerns that are both global and communal and no public authority at this time and age can fail to address both concerns.

This explains why I have held that any procurement regulations which hamper or hinder the operational ability of the ECK must give way as unconstitutional but the ECK may be subject to specially designed Procurement Regulations or Rules which are tailored in such a way as not to hamper or hinder the ECK’s operational ability.

I am happy to note that the ECK concedes this point. The principal question is how it can be made to

account without encroaching on its autonomy which is also based on very sound democratic principles – due to the central role of free and fair elections in any democracy. This is what the Minister for Finance has to focus his attention on in order to reach a fair balance between the two competing ideas of accountability and autonomy.

5) With the above realization in view this Court wishes to reproduce the definition of accountability as set out in Constitutional and Administrative Law Michael Allen and Brian Thompson 7th Edition at page 296 where the learned authors borrowed its description in the words of M David Franker of St Johns College Oxford.

“Accountability –“ can take different forms political financial managerial operational legal professional! It can be to different authorities institutions or individuals – Parliament Ministers managers the courts, auditor’s inspectors, regulators, users customers or the general public ... Accountability can operate through direct supervision on contact, through formal arrangements for reporting on consultation (in public or in private) through procedures such as complaints) which can be activated when required and in various other ways ... accountability or responsibility should lie not just to Central Government and Parliament, but also to the Organisations with which they work and on which they may depend, to local communities to users; and to the wider public. Accountability should take multiple forms and operate through multiple and often reciprocal channels.”

In our legal framework in Kenya three institutions have played major role in achieving a reasonable level of accountability in public institutions, namely the Courts through Constitutional enforcement and judicial review, Parliament through its committee systems including the Public Accounts Committee and the Executive itself by introducing the Rapid Results Initiative (RRI). It is not seriously contended in this matter that ECK notwithstanding its constitutional autonomy, is not subject to judicial review by the Court pursuant to S 123 of the Constitution or that it is immune from Parliamentary scrutiny in the conduct of its affairs or that it is immune from Controller and Auditor General’s audits. In addition the Minister could design in built procurement regulations which take into account the autonomy of the ECK and the need to undertake its constitutional mandate as set out S 41(9) and its obligation to account under the democratic provision, S 1A of the Constitution. All these forms or strategies of accountability are in my view adequate to ensure that the public funds channelled to the ECK are subjected to the principle of accountability. I hold that the constitutional autonomy of the ECK is not incompatible with the principles of accountability intended to be achieved by properly designed procurement laws and regulation tailored to the needs of ECK. S1A does contemplate checks and balances of power. There is a good analogy in terms of describing what power concentrated in a public body could give rise to, in Second Treatise of Civil Government Chapter XII para 143 Locke stated:

“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.”

And since the ECK has conceded that the court has a role both under S 123 of the Constitution and its judicial review jurisdiction it is important to emphasise the role judicial review has played in improving standards in public administration and which this form of accountability could play in the context of the ECK. Kenya, is no doubt in the forefront in developing judicial review as a form of accountability. The result has been the creation of more democratic space in the country and respect for constitutionalism. Judicial review has also significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint I believe it is a sufficient tool in causing the ECK to remain accountable.

I should also like to mention the role of the Public Ethics Act. It does set out principles of public service which every citizen is entitled to expect and how he expects public officials to conduct themselves. In a

way it has to some extent ensured that there is no secrecy on how public services are run. This could be accompanied by a Citizens Charter which public entities should be committed to in order to raise quality, increase options and choices, secure better value for resources including funds, and extend accountability.

The purpose of Public Procurement and Disposal Act is to establish procedures for procurement and disposal of unserveable obsolete or surplus stores and equipment by public entities to maximize economy and efficiency. In a way it is like the Citizens Charter mentioned above. The Acts objectives are:

- (a) to promote competition and ensure that competitors are treated equally.
- (b) to promote the integrity and fairness of those procedures.
- (c) to increase transparency and accountability of those procedures and;
- (d) to increase public confidence in those procedures
- (e) to facilitate the position of local industry and economic development.

I therefore agree with the Interested Party's Counsel and the Attorney General's representative that the above objectives are in no way in conflict with the constitutional autonomy provisions relating to the ECK and as held above the objectives provide checks and balances in a democratic society and which are fully embraced by S1A of the Constitution. I further uphold the Attorney General's contention that the invocation of S 84 in the circumstances of this case has no legal or constitutional basis because the ECK's extent of rights is as defined in the Constitution. A public body has no extra rights, it has only rights which are essential to the performance of its duties. I further agree with the Attorney General's argument that the Exchequer and Audit Act Cap 412 is within the Finance Provisions of the Constitution namely chapter 7 and the regulations which are being impugned have been made pursuant to S 5A of the Exchequer and Audit Act. However on this point it must be appreciated that in interpreting parts of the Constitution the court must look at the objects and purpose of the Constitution as a whole. One of these objects or purpose is to ensure that we remain a democratic society and in this concept the autonomy of the ECK cannot be overridden by financial regulations or an Act of Parliament because the autonomy of the ECK must be and remain to be a basic structure of the Constitution.

6) The ECK has contended that Regulation 40,41 and 42 of the Exchequer and Audit (Public Procurement Regulations 2001) violate S 41(9) of the Constitution. However in deciding on this question it is important to observe as under:

- i. It is common ground that the Public Procurement Complaints Review and Appeals Board established under Regulation 41 is not a court and that it cannot review ECK's constitutional functions. It is only the court which is empowered to do so order S 123(8) of the Constitution
- ii. Under Regulation 42 the Board has the following powers
 - (a) declare the legal rule or principles that govern the subject matter
 - (b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure
 - (c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision
 - (d) annul in whole or in part an unlawful act or decision of the procuring entity other than an act or decision bringing the procurement contract in force.
 - (e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision other than any decision bringing the procurement contract into force

(f) Order that the procurement proceedings be terminated.

S 42 (6) States:

“The Board shall within thirty days, from the date of the notice prescribed under regulation 42(3) issue a written decision concerning the complaint, stating the reasons for the decision and the remedies if any, and the decision shall be rendered I the presence of the parties.

7) “The decision shall be final unless judicial review action is commenced within 30 days under any existing written law concerning judicial review of administrative decisions.”

The ECK contends that under the above regulations its decision concerning any award of Tender by its internal Committee when challenged would have to await at least 60 days as per the regulations and for an undefined period when a judicial review application is filed within 30 days. Obviously the 2005 Public Procurement and Disposal Act and the 2006 Regulations now provide that the Court must give its decision within 30 days failing which the Board’s decision shall prevail and therefore more efficiency has been injected in the tender decision making process and in achieving finality. The ECK contends that the 60 days could adversely affect its programmes and efficiency in performing its constitutional duties and on this the court agrees with it. This period or an indefinite waiting for a court decision would affect its operational efficiency and autonomy. I find and hold that any practice, transaction or procedure which in turn has the potential of introducing lengthy delays of the nature described would be unconstitutional and void.

Under Regulation 64 of the Public Procurement and Disposal Regulations 2006 – it is now possible for a Public Entity such as the ECK to seek permission to use specially permitted procedure which is tailored to its special needs. However the court notes that the 2006 Regulations have no retrospective effect and therefore do not apply to the tender in question in this matter namely ECK11/2006-2007 dated 11th September, 2006 – the tender was for the supply of badges, forms, stickers, posters, manuals and booklets for the period and to December 2007.

The court accepts ECK’s argument that procurement forms a major component of its constitutional function which are in turn tied to its autonomy under S41 (9) of the Constitution.

The reason for this is that all the items mentioned are required for voter education, voter registration and revision of electoral register including all the items generally required to enable the ECK to manage by-elections and the General Elections. Some of the items are required on a continuous basis.

I find that a period of indecision for 60 days as per the Regulations impugned would adversely effect the ECK’s operational autonomy because it might prevent it from fulfilling its constitutional mandate whether as regards by elections or the General Elections. I find that the autonomy given to the ECK under the Constitution includes budgetary, financial and operational autonomy to be able at all times to discharge its duty. However as held above the ECK is not immune to financial accountability pursuant to S1A of the Constitution and indeed, no public entity is so immune to the principle of accountability in a democratic state such as Kenya. However it is the view of the court that the earlier described forms of accountability, by Parliament, Judiciary, Controller and Auditor General, Executive and by the Media and Contractual liability would be sufficient to ensure that the necessary constitutional checks and balances in a democracy, result in ECK’s accountability at all times without undermining the autonomy, without which it cannot effectively discharge its constitutional mandate. I find and hold that the ECK should always have the flexibility it needs and specially designed procurement rules, which do not diminish vitiate or negate its autonomy. However I further hold that autonomy is not inconsistent with accountability.

Consequently I find hold and declare that Regulations 40,41 and 42 of the Exchequer and Audit (Public Procurement) Regulations 2001 violate S41(9) of the Constitution and are null and void to the extent that they are targeted against the ECK only but are valid as against the other specified public bodies.

I further declare that 2006 Regulations would apply to the ECK if specially tailored to suit its autonomy as envisaged in Regulation 64 which provides for a special procedure in exceptional cases such as that of the ECK.

I accordingly grant the following declarations:

1. Declaration 1
2. Declaration 9
3. declaration 11
4. declaration 12
5. declaration 13 except the order for costs.

All other declarations sought in the Motion are declined.

I make no order as to costs.

DATED and delivered at Nairobi this 20th day of July 2007.

J.G. NYAMU

JUDGE

Mr Onsando/Ogonji/Tiego for the applicant

Mr Wandabwa for 3rd Respondent

Mr Ombwayo