



THE JUDICIARY

SEPTEMBER 2012-FEBRUARY 2013

PRE-ELECTION REPORT

Judiciary Working Committee on Election Preparations (JWCEP)

Table of Contents

ACKNOWLEDGEMENTS	4
FOREWORD	5
PREFACE	7
LIST OF ABBREVIATIONS	9
1. INTRODUCTION TO THE JUDICIARY WORKING COMMITTEE	
ON ELECTION PREPARATIONS	11
1.0 Background	11
1.2 Terms of Reference	11
1.3 Composition of the JWCEP	13
2. LEGAL AND ADMINISTRATIVE ARRANGEMENTS	15
2.0 Background	15
2.1 Amendments to the Elections Act	15
2.2 Development of Rules	16
3. TRAINING	21
3.0 Background	21
3.1 Training of Trainers (TOT)	22
3.2 Training of Court of Appeal and High Court Judges	23
3.3 Training for Land and Environment Court and Industrial Court Judges	24
3.4 Training of Magistrates and Legal Researchers	25
3.5 JWCEP Secretariat Team Building	26
4. MONITORING AND EVALUATION	29
4.0 Background	29
4.1 Training and Development of Case Management System	30
5. STAKEHOLDER ENGAGEMENT	33
5.0 Background	33
5.1 Interfacing with other State Organs and Institutions	34
5.2 Working with the National Council for the Administration of Justice (NCAJ)	36
5.3 Working with the International Development Law Organization (IDLO)	37
5.4 Working with the International Commission of Jurists-Kenya (ICJ-K)	38
5.5 Working with the International Foundation for Electoral Systems (IFES)	39
5.6 Working with the Electoral Institute for Sustainable Democracy in Africa (EISA)	39

5.7 Working with The Ford Foundation	40
5.8 Working with the GIZ	40
5.9 Working with the National Council for Law Reporting (NCLR)	41
6. PUBLIC ENGAGEMENT	43
6.0 Background	43
6.1 Public Engagement Initiatives	43
6.2 The Kuvuka Kuvuka initiative	46
7. LESSONS LEARNT	51
7.0 Background	51
7.1 Training of Trainers (TOT)	51
7.2 Lessons Learnt from Training of Judges	52
7.3 Lessons Learnt from Training of Magistrates and Legal Researchers	53
7.4 Lessons Learnt from the Hearing and Determination of Cases Touching on Elections	54
7.5 Lessons Learnt from Election Dispute Resolution (EDR) Cases	54
8. GOING FORWARD	57
8.0 Background	57
8.1 Calendar of Events	57
9. APPENDICES	61
APPENDIX 1: CHIEF JUSTICE'S MEMO ON THE JUDICIARY AND MARCH 2013 GENERAL ELECTIONS	62
APPENDIX 2: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013	66
APPENDIX 3: FREQUENTLY ASKED QUESTIONS (FAQs) SUPREME COURT (PRESIDENTIAL ELECTION PETITION) RULES, 2013 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013	83
APPENDIX 4: CASE MANAGEMENT TIME-TABLE FOR ELECTION PETITIONS	85

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The production of this report would have been impossible without the collaborative efforts of various actors who have contributed towards the success of the work of the Committee thus far.

The JWCEP sincerely wishes to thank the Chief Justice, Dr Willy Mutunga and the Chief Registrar of the Judiciary, Mrs Gladys Shollei, who have supported the Committee to enable it to achieve its mandate as set out in the terms of reference. The Committee also acknowledges the National Council for Law Reporting (NCLR) for their invaluable support especially in providing information resources.

The Committee also remains grateful for the support that the civil society stakeholders and development partners have extended towards the fulfilment of its mandate. The support accorded to us by International Commission of Jurists-Kenya (ICJ-K), the International Foundation of Electoral Systems (IFES), the Electoral Institute for Sustainable Democracy in Africa (EISA), Institute for Law and Environmental Governance (ILEG), the International Development Law Organization (IDLO), the Ford Foundation, GIZ and the Institute for Education in Democracy (IED) deserves special recognition. We truly value their partnership in our quest to provide effective and efficient electoral justice for all Kenyans and are indebted to them for having availed financial resources and technical support towards our work. We look forward to an even more fruitful and mutually beneficial collaboration with them going forward.

We are also grateful to the judicial officers who served as trainers for magistrates and legal researchers at our regional trainings. Without them, our training capacity would have been thoroughly deficient. Our gratitude also extends to Helena Kithinji, Muthoni Kamuru and Enosh Bolo who not only trained our trainers, but who have continued to provide support to the Committee and its Secretariat in achieving its mandate.

The research support of Ms. Petronella Mukaindo, Ms. Lucianna Thuo, Ms. Victoria Miyandazi, Mr. Fred Nying'uro, Mr. Masha Baraza and Mr. Mokaya Orina has been invaluable to the work of the Committee.

We remain especially grateful to USAID, DANIDA and IDLO who generously supported the publication of this report.

FOREWORD

The Constitution of Kenya 2010 makes it clear that judicial authority is derived from the people of Kenya and vests in, and shall be exercised by the courts and tribunals established by, or under the Constitution. The Supreme Court has emphasized that the Constitution is not just a statute but a mirror reflecting the national soul and that the exercise of judicial power must therefore reflect the consciousness of the public. The JWCEP's work is anchored in the first pillar of the Judiciary Transformation Framework, that is, people-focused delivery of Justice. The JWCEP aims to deliver the three key result areas: access to and expeditious delivery of justice; people centeredness and public engagement, and; stakeholder engagement.

In our last report, we recounted how the events succeeding the 2007 elections affected the public perception of the Judiciary, particularly its ability to be impartial in the handling of electoral disputes. The Judiciary, as a whole, has worked hard to restore this much-needed public confidence.

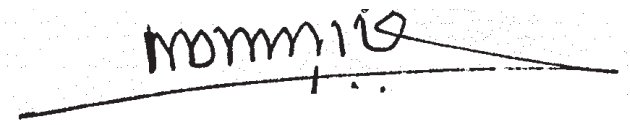
The JWCEP has undertaken extensive training of judges, magistrates and other judicial staff in order to enhance capacity of the judiciary to handle the numerous disputes anticipated after the March 2013 elections. This training seeks to expose judicial officers to electoral law and practice in anticipation of their role in the electoral dispute resolution process. This training has proved to be crucial in the determination of cases touching on the electoral process throughout the country. We are pleased with the reports that we have received from around the country of the expeditious disposal of these cases, particularly where the High Court sat to review the decisions of the IEBC on the nomination process.

The JWCEP is cognisant of the fact that people are at the heart of any quest for justice. It is for this reason that the Committee strives to keep the public informed of its work in preparing the Judiciary for elections. The publication of this report is one such effort. The more information people have on the workings of the Judiciary, the more confidence they have in its ability to impartially arbitrate over any disputes they might have.

Engagement with stakeholders, particularly our civil society partners, has served to increase capacity for our preparation activities. Moreover, since they are equipped with an array of resources that the JWCEP may not be

endowed with, our engagement with them has served to complement the expertise and resources of the Committee.

We are satisfied that the work of this Committee has served to lay the foundation for the preparation of the Judiciary for the electoral process. We are now keen to build on this foundation by giving Kenyans a dispute resolution process that is not only effective and efficient, but one that makes certain that the fairness of the entire process is incontrovertible.

A handwritten signature in black ink, appearing to read 'Mohammed Ibrahim', is written over a horizontal line. The signature is stylized and cursive.

**Mr. Justice Mohammed Ibrahim,
Supreme Court Judge,
Chair of the Judiciary Working Committee on Election Preparations**

PREFACE

This is the second report published by the JWCEP on its work. Since the publication of the Interim Report in September 2012, the Committee and in particular its Secretariat has been hard at work to prepare the Judiciary for electoral dispute resolution this year. The Committee has undertaken several activities under its five-fold terms of reference, all of which are detailed in this report.

Of particular significance is the training of all judges, magistrates and legal researchers on electoral dispute resolution. This has served to create a pool of judicial officers who are trained on electoral dispute resolution from which those who will handle election petitions will be selected in April.

The JWCEP has also continued to tap into the resources available among its stakeholders and development partners, whose support have proved instrumental to the work of the Committee. We are encouraged by the goodwill that we have enjoyed with them and the encouragement they have given us in our work. It is for this reason that engagement with them has been continuous since the work of the Committee began. This crucial support has given us the wind beneath our sails, and we are certain that with their support, we can only do better.

We also strive to keep the public informed of our activities. We hope that this report serves to assure you that the Judiciary is working tirelessly to provide forums for impartial, effective and efficient dispute resolution.

We wish to restate that the Committee is leaving no stone unturned in preparing the Judiciary for elections. We are keen to turn over a new leaf in Electoral Dispute Resolution (EDR) and set new standards for electoral dispute resolution that will not only greatly help in ensuring a flawless resolution of electoral disputes after the 4th March 2013 general election but also ensure the same in future electoral cycles.



**Hon. Lillian Arika,
A.g. Senior Principal Magistrate
Secretary/CEO,
Judiciary Working Committee on Election Preparations**

LIST OF ABBREVIATIONS

CIOC	Constitution Implementation Oversight Committee
CLE	Continuous Legal Education
CSO	Civil Society Organisation
DPP	Directorate of Public Prosecutions
EISA	Electoral Institute for Sustainable Democracy in Africa
EDR	Electoral Dispute Resolution
IAC	Inter-Agency Committee
ICJ-K	International Commission of Jurists-Kenya
IDLO	International Development Law Organization
IED	Institute for Education in Democracy
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation of Electoral Systems
ILEG	Institute for Law and Environmental Governance
JLAC	Justice and Legal Affairs Committee of Parliament
JTI	Judiciary Transformation Institute
JWCEP	Judiciary Working Committee on Election Preparations
GIZ	Gesellschaft für Internationale Zusammenarbeit
LSK	Law Society of Kenya
NCAJ	National Council for the Administration of Justice
NCLR	National Council for Law Reporting
NDRC	Nomination Disputes Resolution Committee
NDI	National Democratic Institute
PPDT	Political Parties Disputes Tribunal
RPP	Registrar of Political Parties
TOT	Training of Trainers



Background

Terms of Reference

Composition of the
JWCEP

INTRODUCTION TO THE JUDICIARY WORKING COMMITTEE ON ELECTION PREPARATIONS

1.0 Background

The Judiciary Working Committee on Election Preparations is the body that is tasked with assisting the Judiciary to prepare for electoral dispute resolution. It was unveiled on the 10th of May 2012.

1.2 Terms of Reference

The mandate of the Committee is to:

1. To advise the Judiciary on the administrative arrangements and measures for the efficient disposal of election-related disputes.
2. To develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff.
3. To develop and design a system for monitoring and evaluating the

management and administration of election-related disputes in court.

4. To liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election related disputes and offences.
5. To advise the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

The JWCEP released its first report in September 2012. The Committee has undertaken several activities under the terms of reference, all aimed at preparing the Judiciary for elections. This report sets out a summary of the work of the JWCEP since September 2012.

Training of Supreme Court staff on etiquette and teamwork in readiness for the election dispute resolution on 8th February 2013.



1.3 Composition of the JWCEP

The Committee members of the JWCEP are:

- *Justice Mohammed Ibrahim, Supreme Court Judge (Chairman)*
- *Justice (Dr.) Smokin Wanjala, Supreme Court Judge (Member)*
- *Justice David Maraga, Court of Appeal Judge (Vice-Chair)*
- *Justice Paul Kihara Kariuki, Court of Appeal Judge (Member)*
- *Lady Justice Hellen Omondi, High Court Judge (Member)*
- *Justice David Majanja, High Court Judge (Member)*
- *Hon. Roseline Oganyo, Senior Principal Magistrate (Member)*
- *Hon. Lillian Arika, Ag Senior Principal Magistrate (Secretary)*
- *Justice Mbogholi Msagha, Principal Judge of the High Court (Co-opted Member)*
- *Hon. Anthony Mwicigi, Senior Resident Magistrate (Co-opted Member)*



Background

Amendments to
the Elections Act

Development of
Rules

LEGAL AND ADMINISTRATIVE ARRANGEMENTS

2.0 Background

The JWCEP is tasked with, among other things, advising the Judiciary on legal and administrative arrangements for the effective and efficient resolution of electoral disputes.

2.1 Amendments to the Elections Act

The JWCEP noted that due to the anticipated high number of petitions that may arise out of the 4th March 2013 general elections, the High Court would likely be overwhelmed by disputes arising from Parliamentary and County elections. The JWCEP recommended that the Elections Act, 2011 be amended to devolve jurisdiction to Magistrates Courts to hear disputes relating to members of the County Assembly.

The JWCEP also drafted proposed amendments to the Act to provide for appeals and time limits for hearing and determination of appeals from the decision of the Magistrates' Court and the High Court. The proposed time

limit for hearing and determination of appeals was set at 6 months and the scope of the appeals from the Magistrates' Court to the High Court was limited to matters of law.

In view of the ambiguity of the power to make rules of procedure and practice, the JWCEP proposed that the Rules Committee established under the Civil Procedure Act be empowered to make rules regarding election petitions.

Although the proposals for amendment of the Act were made early in the year, they were not included in the Elections Amendment Bill tabled in the National Assembly on the 23rd of November 2012. Due to the pressure of time, it was crucial to lobby for enactment of these provisions before Parliament was dissolved on the 4th of January 2013.

The JWCEP met with the Justice and Legal Affairs Committee (JLAC) and Constitution Implementation Oversight Committee (CIOC) of Parliament on the 4th of December 2012 with a view to securing the passage of the proposed amendments.

The amendments were tabled before the National Assembly by the Honourable Attorney General, Professor Githu Muigai, and passed in the *Statute Law (Miscellaneous Amendments) (No. 2) Act, 2012*. The amendment Act was assented to on the 31st of December 2012 and came into force on 4th of January 2013.

2.2 Development of Rules

2.2.1 The Elections (Parliamentary and County Elections) Petition Rules, 2013

The JWCEP proposed an amendment to section 96 of the Elections Act to empower the Rules Committee to make rules of procedure governing the the conduct of election petitions alongside a similar power given to it in relation to referendum petitions.

Public participation is one of the National Values and Principles of Governance recognised by the Constitution of Kenya 2010 and the Committee, in anticipation of the amendments to the Act, began engaging actively with stakeholders with a view to developing rules to replace the framework that existed under the National Assembly and Presidential Elections Act (Chapter 7 of the Laws of Kenya), that is the National Assembly and Presidential Election Rules, 1993. These rules were found wanting as they were not in consonance with the new Constitution and the Elections Act, 2011. The consensus among stakeholders was that the former regime of rules focused on procedural technicalities at the expense of substantive justice. These rules played a significant role in eroding public confidence in the Judiciary's handling of electoral disputes.

The JWCEP, with the generous support of stakeholders, held several validation workshops which were also attended by representatives of the Independent Electoral and Boundaries Commission (IEBC), the Law Society of Kenya (LSK) and other organizations. The Committee was keen to include representation from the LSK in order to encourage advocates to own the rules and the rule-making process and make them more likely to comply with the rules once they come into force.

Following these workshops, a draft was developed which formed part of the training material that was used for the training of judges and magistrates on electoral dispute resolution. The training also offered a forum for the validation of the rules, where judges and magistrates gave their comments from the perspective of the bench. These comments were taken into account in the development of the final draft of the rules. The final draft was presented to the Rules Committee for approval and gazettment. The rules were finally gazetted on 22nd February 2013.

2.2.2 Supreme Court (Presidential Election Petition) Rules, 2013

Under Article 163 (3) (a) of the Constitution, the Supreme Court is the only body that is empowered to hear and determine disputes relating to the elections to the office of President. Article 163(8) empowers the Court to make rules for the exercise of its jurisdiction.

The JWCEP developed and forwarded to the Chief Justice an initial draft of the Presidential Election Petition Rules. The Supreme Court Technical Committee on Rules developed the rules for consideration by the Supreme Court.

Meeting members of Justice and Legal Affairs Committee of Parliament (JLAC)





The revised draft of the Rules was forwarded to JWCEP to assist with the process of public validation. The proposed rules were published in the daily newspapers on the 11th of January 2013 for public comment. The JWCEP engaged the Political Parties Forum and received valuable suggestions on the Rules. The JWCEP also organized a validation workshop with stakeholders on 12th of January 2013. The JWCEP prepared a report and submitted it to the Supreme Court for consideration alongside the comments made on the draft.

The Supreme Court approved the final draft of the rules which were published in the Kenya Gazette and came into force on the 1st of February 2013.

The JWCEP recognises that an effective and efficient electoral dispute resolution stems from a clear legislative and regulatory framework. The Committee will continue to monitor the implementation of the rules and where necessary make suggestions for amendment to enhance the delivery of substantive justice. These rules will also be supplemented by practice directions to be issued by the Chief Justice from time to time.

2.2.3 Administrative Arrangements

In addition to the legal arrangements made as outlined above, the Committee also proposed certain administrative arrangements to the Chief Justice.

The Elections (Parliamentary and County Elections) Petition Rules, 2013 set out certain administrative arrangements which were proposed by the Committee. *Rule 6 (4)* provides that a judge or a magistrate designated under the rules may not, for the duration of the election petition, be engaged in any other court matter except a matter for which a ruling of judgment was pending and the date of which ruling or judgment is within the period before the judge or magistrate concludes the election petition or petitions. This is expected to go a long way in ensuring that election petitions are heard and determined within the frame of 6 months that is set out in the Constitution. In addition, rule 17 of the said rules makes provision for the scheduling of a pre-trial conference by the election court within 7 days of receipt of the last response to a petition. This is an arrangement that has been hugely

successful in Uganda, a jurisdiction with similar provisions in its laws relating to the timelines for the hearing and determination of electoral disputes. The pre-trial conferencing assists the court in setting the ground rules for the trial of an election petition, thus avoiding unnecessary delays. It is at this forum that the court frames the issues for determination, confirms the number of witnesses, deals with any interlocutory matters and gives directions as to the place and time of hearing of the petition and other general orders that would assist in expeditiously disposing of the petition.

Over and above these provisions in the Rules, the Committee proposed more administrative arrangements that would take effect sooner and give general direction to the Judiciary in the handling of any disputes touching on elections generally.

The first of these was to require all judicial officers to rationalize their diaries with the electoral cycle in order to be able to handle election-related cases as and when they arise.

Second, the Committee proposed to the Chief Justice that judicial officers should not be allowed to take annual leave between March and October 2013. It is expected that the anticipated electoral disputes will impose a heavy burden on the judiciary in terms of handling of cases. It is therefore crucial to have all hands on deck.

Third, JWCEP proposed that cases touching on the elections be prioritized and expeditiously determined. Any delay in the determination of cases touching on the electoral process has the effect of lowering public confidence in the Judiciary. It is therefore crucial that such decisions are delivered in a timely fashion to demonstrate that the Judiciary is capable of delivering justice expeditiously and efficiently.

These proposed administrative arrangements were adopted by the Chief Justice and published in the *Chief Justice's Circular No. 178*.



Working with Justice and Legal Affairs Committee of Parliament (JLAC)

Background

Training of Court
of Appeal and High
Court Judges

Training for Land
and Environment
Court and
Industrial Court
Judges

Training of
Magistrates and
Legal Researchers



TRAINING

3.0 Background

The JWCEP is required to develop and implement, in conjunction with the Judiciary Training Institute, a training programme for the efficient and effective management of election disputes for judicial officers and support staff.

Training is aimed at increasing capacity for the monumental role that judicial officers are expected to play in the forthcoming elections. For a long time, it was thought that once judicial officers joined the bench, they were competent to handle any matter they were faced with, no matter how complex it was, as long as it was competently argued. This notion was debunked by the Kriegler Report, which noted:

Many commonwealth countries, such as Kenya, adhere to the quaint fiction that judges are generalists who can grasp any matter, however esoteric, provided it is competently argued. In the case of electoral disputes, this attitude needs to be re-examined. The principles and practice have developed exponentially over the last two decades and

a substantial body of international learning has been produced. All of this bears on dispute resolution and ideally requires specialized judicial attention. Because electoral disputes usually demand rapid resolution, and do not allow time for extensive legal research by the adjudicating tribunal, familiarity with electoral law and practice is therefore a highly desirable attribute of such a tribunal.

It is this kind of indictment of the bench that informed the introduction of the training of judicial officers as part of the the Second Pillar in the Transformation Framework: Transformational Leadership, Organisational Culture and Professional and Motivated Staff. *Key Result Area No. 7* is focused on growth of jurisprudence and judicial practice, with training being seen as one of the tools of developing sound jurisprudence. Sound jurisprudence is the lifeblood of any Judiciary.

The training of judicial officers goes a long way in increasing their competence to handle not just electoral disputes but all matters that come before them. As pointed out in the Kriegler report, electoral disputes by their nature are issues of public interest as they relate to the acquisition and wielding of power over an electorate. The Committee took the position that it was necessary to train all judicial officers on electoral dispute resolution as one of the ways of preparing the Judiciary for the handling of electoral disputes.

The Committee engaged the services of consultants with the generous support of our civil society partners, to prepare a curriculum for the training of judicial officers. The curriculum was validated by Judicial Officers and Stakeholders before being used to train trainers between the 8th and the 11th November 2012.

3.1 Training of Trainers (TOT)

The training of trainers consisted of 35 participants made up of a mixture of Judges and Magistrates and ran from 8th-11th of November 2012. It was facilitated by Helena Kithinji, Muthoni Kamuru and Enosh Bolo.

The main aim of the training was to train participants on the methodology and current practices of effective training. Participants learnt various training techniques including role play, brainstorming and group work. They were also engaged in a session on adult-learning techniques. The TOT was very helpful as the participants were used as facilitators for the regional trainings for Magistrates and legal researchers from 20th-27th of January 2013.

The training of trainers for magistrates was done in anticipation of the amendments to the Elections Act giving the magistracy jurisdiction to hear county election petitions. The training of trainers (ToT) strategy for magistrates was informed by the need to increase the long-term training capacity within the Judiciary.

The trainers were engaged on the effective conduct of adult learning, how to effectively deliver on the training content and on how to align the methods of training with the content.

3.2 Training of Court of Appeal and High Court Judges

All Judges of the High Court and of the Court of Appeal were trained between the 11th and the 18th of November 2012 on elections and election petition management. Judges were the immediate target group for the training programme because the amendments to the law giving jurisdiction in relation to county petitions to magistrates had not passed. Due to the similarities between the Kenyan and Ugandan legal systems and the experience of the Ugandan judiciary in the handling of election petitions in a devolved government, The Committee agreed to involve Ugandan judges in the training. The Committee wishes to acknowledge the services of Justice Remmy Kasule, of the Court of Appeal, Uganda and Justice Lawrence Gidudu of the High Court, Uganda in providing international perspectives on electoral dispute resolution during the training of judicial officers.

Daniel Blessington of USAID
at JWCEP training of Judges in
Naivasha





3.3 Training for Land and Environment Court and Industrial Court Judges

Justice Gidudu of the Ugandan High Court and Justice Githinji of the Court of Appeal at the JWCEP training of Judges in Naivasha

These two courts are specialized courts as established under Article 162 (2) of the Constitution. They are courts of the status of the High Court that have exclusive jurisdiction in relation to employment and labour relations and the environment and the use and occupation of and title to land.

Although there is a controversy as to whether or not these courts have jurisdiction in respect of matters falling outside the purview of Article 162 (2) of the Constitution and whether they can hear any dispute falling within the jurisdiction of the High Court, the Committee took the position that it was important to train all the judges of these two courts to increase the pool of judicial officers from which the election court can be constituted. In the event that it is finally resolved that they have no jurisdiction to hear these disputes, they could still be called upon to relieve the High Court of the increased strain placed on it by the influx of electoral disputes anticipated after the 4th March 2013 elections.



Training of Judges of the Land and Environment and Industrial Court on EDR organized by ILEG in partnership with Ford Foundation

3.4 Training of Magistrates and Legal Researchers

In November 2012, the JWCEP engaged consultants to develop a trainer's manual that would be used by the trainers to train magistrates and legal researchers. This manual would be accompanied by a Participants' Handbook on EDR.

Following several validation meetings in January 2013, the handbook and manual were printed and used for the training of magistrates and legal researchers on 20th-27th January 2013. Due to the huge numbers of participants involved, the trainings were carried out in 5 regions simultaneously, i.e. Nairobi, Nakuru, Kisumu, Nyeri and Mombasa. The trainers were split into teams based on their ability to work well together, with the deployment of training teams being done by consensus between the JWCEP and the training consultants to ensure that the trainers were comfortable both with the teams and the regions to which they were sent.

The training manual that has been developed by the JWCEP with the invaluable support of its stakeholders will not only be used for trainings on electoral dispute resolution for the forthcoming general elections, but will also form part of a wider training programme for the Judiciary in the handling of poll-related disputes.

The trainings have served to enhance both the skills and knowledge of

the judges, magistrates and legal researchers and signal to the public how seriously the Committee takes the role of the Judiciary in electoral disputes resolution in 2013. The judicial officers who were trained will form the pool from which those who take part in electoral dispute resolution will be selected. The Committee also facilitated the training of Supreme Court staff on teamwork and etiquette on the 8th of February 2013.

The Committee is expected to undertake several other trainings. The first of these is training of registrars, deputy registrars and executive officers on the e-based case management system and on monitoring and evaluation of the post-poll petitions. This training is expected to be conducted soon after the March 2013 general elections.

In addition, the JWCEP is planning a training of the select bench of judicial officers who will be tasked with electoral dispute resolution following the 4th March 2013 general elections. It is anticipated that the bench will be unveiled by April 2013. This group will thereafter be taken through a specialized training more focused on case management aspects and addressing any possible challenges that they may encounter in the process of dispute resolution. To ensure that this training is effective, the clerks, secretaries and legal researchers of these judicial officers will also take part in the training.

3.5 JWCEP Secretariat Team Building

As part of its internal capacity building initiatives, the JWCEP Secretariat held a 2 days Team Building event at the Red Court Hotel, Nairobi on 16th and 17th February 2013. The program, which was sponsored by the International Development Law Organization (IDLO), was facilitated by three resource persons from Working Smart Company who have wide experience in supervisory, leadership and personal effectiveness, culture and change management and motivation talks.

The objectives of the retreat were to:

- sensitize and inspire the team of catalysts for change;

In pictures: JWCEP Secretariat in a Team Building event at the Red Court Hotel, Nairobi on 16th and 17th February 2013



- increase self awareness and appreciate personality differences that often cause conflict and misunderstanding;
- enhance knowledge and skills in the application of different styles of authority and leadership;
- immerse the team in the fundamentals of branding and image;
- Enhance teamwork and synergy.

The members had an intense, vigorous and energized program based on Leadership Skills. At the end of the session, participants had known each other better, learnt a lot from each other, were refreshed and had learnt how to better work efficiently and effectively with one another as a team.

In pictures: JWCEP Secretariat in a Team Building event at the Red Court Hotel, Nairobi





Background

Training and
Development of
Case Management
System

MONITORING AND EVALUATION

4.0 Background

The third mandate in the JWCEP's terms of reference requires the Committee to develop and design a system for monitoring and evaluating the management and administration of election-related disputes in court.

This arose out a realization that in the past, once petitions were allocated to judges for hearing and determination, there was no follow up on the progress of the case until the judgment was delivered. Having had discussions with judges who have handled election petitions, there was a realization that there was need for constant communication so as to give them a forum to share their experiences and access assistance in addressing the challenges they face while handling petitions. This is especially important because many judicial officers have not had the experience of handling petitions either in their career on the bench or even in practice. That, coupled with the fact that respondents often employ every delay tactic imaginable to stop the case from progressing, means that judicial officers require a constant support system during the entire period of hearing and determination of petitions.

4.1 Training and Development of Case Management System

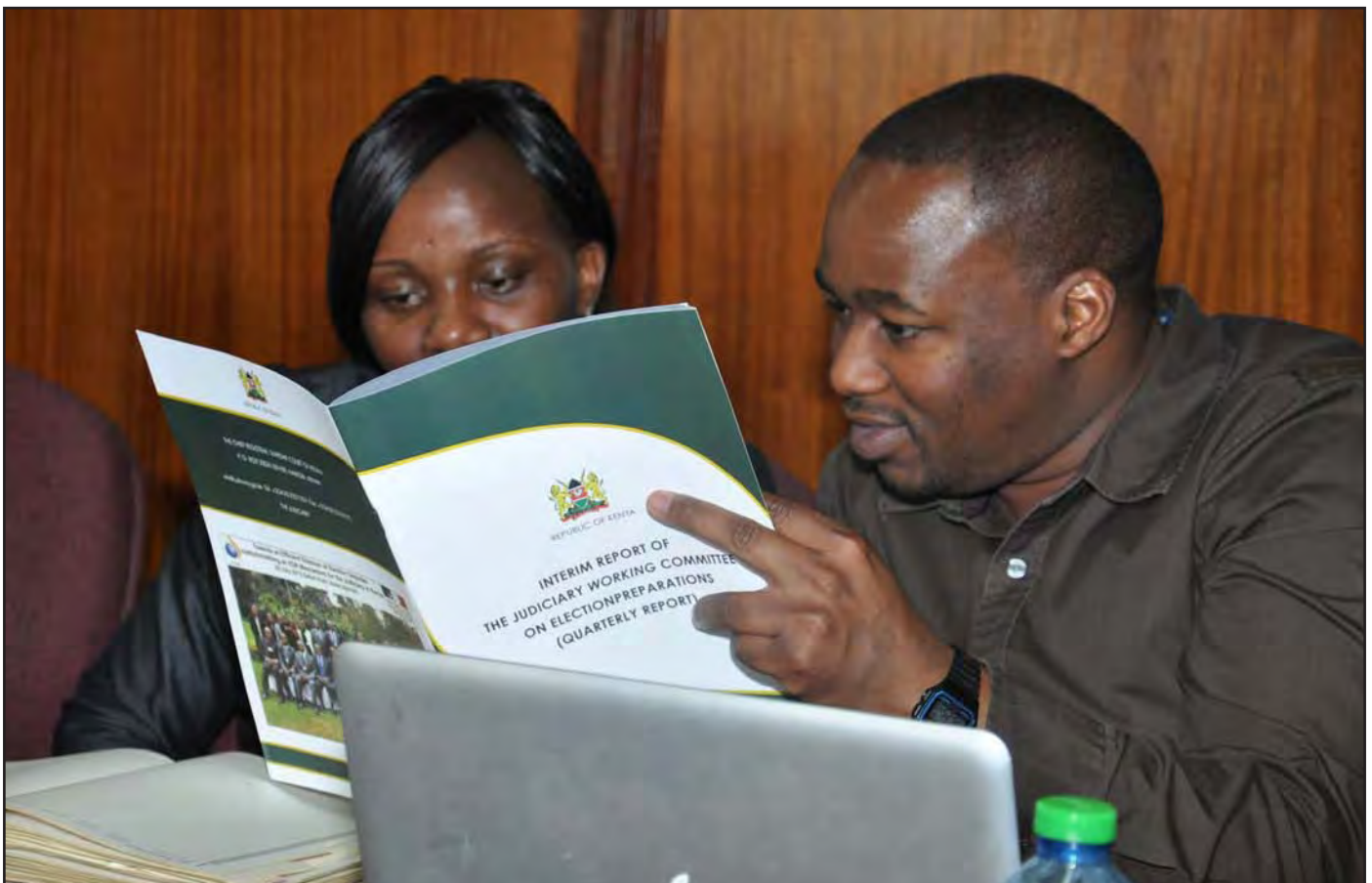
The JWCEP has therefore, with the support of stakeholders, undertaken to develop a case management system that will enable the members and the Secretariat to monitor the progress of every case filed up until it is concluded. The information generated by the system will assist the Committee to liaise with judicial officers over any delays in the hearing and determination of petitions and ensure that all matters are concluded within the timelines set out in the Constitution and the Elections Act.

In addition to the development of the system, the Committee has organized a training of Registrars, Deputy Registrars and Executive Officers on case management and monitoring and evaluation. The training was organized to empower the officers of the court who are tasked with case management from day to day to deal more efficiently with election petitions and other election-related cases. Every cog in the wheel of justice needs to be oiled in order for the entire system to run smoothly.

The case management system will also enhance the capacity of the judiciary to deliver real time information on election petitions in the country. This will not only enhance efficiency but also increase accountability and transparency to the public. The Committee expects that the case management aspects will also be integrated into the long-term Judiciary training curriculum.

In pictures: Key players in Judiciary Case Management System





Background

Interfacing with
the IEBC and
Other Relevant
Constitutional
Institutions

Working with
the National
Council for the
Administration of
Justice (NCAJ)

Working with
the International
Development
Law Organization
(IDLO)

Working with
the International
Commission of
Jurists-Kenya
(ICJ-K)

Working with
the International
Foundation for
Electoral Systems
(IFES)

Working with the
Electoral Institute
for Sustainable
Democracy in
Africa (EISA)

Working with
The Ford
Foundation

Working with the
GIZ



STAKEHOLDER ENGAGEMENT

5.0 Background

The fourth term of reference of the Committee is to liaise and coordinate with stakeholders to ensure efficient, effective and timely resolution of election-related disputes and offences.

Stakeholder engagement has been continuous since the JWCEP began its work. The engagement has taken various forms, covering the various activities falling within the mandate of the Committee. The expertise and capacity of the various stakeholders has proved invaluable to the work of the Committee and to the effective delivery on the terms of reference given to it.

5.1 Interfacing with other State Organs and Institutions

The Independent Electoral and Boundaries Commission (IEBC) is tasked with, among other things, the conduct of elections to any elective body established under the Constitution, and any other elections as prescribed under an Act of Parliament.

In addition, it is charged with the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results. Moreover, the IEBC is charged with the development of the Code of Conduct for candidates and parties contesting the elections and with enforcing the same.

The JWCEP recognizes the need for collaboration with the principal agencies in charge of the investigating and prosecuting election offences. The Directorate of Public Prosecutions (DPP), IEBC, the National Police Service and the Judiciary are all independent Constitutional institutions, but their functions are interdependent. As such, the competence of one institution directly affects the others and the entire justice system, and weaknesses in any one of these institutions negatively impacts on the public perception of justice delivery across the system. The ability of the DPP, the IEBC and the National Police Service to undertake effective investigations and competently prosecute perpetrators of electoral offences directly influences the ability of the Judiciary to effectively handle disputes. Ours being an adversarial system, the ability of the Judiciary to dispense justice is based on the facts that are placed before it. Moreover, the field of prosecution was formerly the preserve of the Police and the DPP, but this power is now shared with the IEBC. This new mandate of the IEBC requires the forging of partnerships between associated stakeholders in order to enable each and every one of them to effectively and constructively undertake their respective mandates.

The JWCEP has since September 2012 been actively engaged in the Inter-Agency Committee (IAC) comprising the DPP, the IEBC, the National Police Service and the JWCEP. Under the terms of reference developed for the Inter-Agency Committee, the objectives were to:

- ensure compliance and coordination on issues concerning the investigation and prosecution of electoral offences;
- advising the IEBC on compliance issues with specific focus on the role of prosecution and identification of offenders;
- consolidation of best practices in implementing the mandate of the investigation and prosecution;
- identification and collation of recent legislation on investigation and prosecution;
- research and identification of likely offences;

- the development of draft charges and isolation of specific charges;
- the building of capacity of investigators and prosecutors across the organizations;
- the development of a mechanism for coordination and collaboration with various stakeholders;
- the compilation and development of a handbook on relevant electoral laws and regulations;
- the identification of IEBC officers to be trained on investigations and prosecutions with particular focus on electoral disputes and offences.

The JWCEP has therefore actively been involved in related activities processes such as the development of standard charge sheets that will make it easier



Justice Muga Apondi, Ruth Makuthu of IEBC and Elisha Ongoya, Advocate at our Naivasha training of Judges.

for the Police and prosecutors to prosecute suspects of election offences. These charge sheets have been validated and are being actively distributed to the regional election coordinators as well as the county election coordinators.

The JWCEP also attended an Inter-Agency retreat to develop election offences documentation between the 16th and the 19th of October 2012. At that forum, the Committee participated in discussions on the legal framework for free and fair elections, the particulars of investigations and charges including statement recording, case file compilation, witness protection, drafting of charges and trial advocacy. The JWCEP made a presentation at that meeting on the preparation activities that it had undertaken in preparing the Judiciary for the elections.

The JWCEP also attended an Inter-Agency working retreat to develop a

handbook on investigation and prosecution of electoral offences which took place between the 6th and 7th of December 2012 at the Elementaita Country Lodge.

The Committee also attended a forum with the IEBC and PPDT that was aimed at deliberating on the handling of pre-election disputes by the PPDT and IEBC.

5.2 Working with the National Council for the Administration of Justice (NCAJ)

The JWCEP has been working with the technical committee of the NCAJ to coordinate election-related activities. The JWCEP took part in a meeting of the National Council on the Administration of Justice on the 29th of January 2013 which was specifically called by the Chief Justice to discuss the impending elections. The forum was used to not only to set out the state of the Judiciary's own preparedness but also to engage with other actors in the justice sector and emphasize the importance of their own preparedness.

Justice Maraga making a presentation at the NCAJ meeting. Mr Kimaiyo, Inspector General was present.



Moses Owuor of IFES and Mugambi Laibuta formerly of IDLO at the training of judges in Naivasha



5.3 Working with the International Development Law Organization (IDLO)

The unwavering support of IDLO has proved very critical to the Secretariat of the JWCEP. IDLO has not only supplied the Secretariat of the Committee with researchers and interns to provide legal support for its work, but has also been involved in supplying various technical experts for the work of the Committee. The JWCEP is grateful for their support in availing an expert to assist in drawing up the budget, legal draftsmen to assist in developing the The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Petition) Rules and an expert to assist in the editing and publication of this report.

IDLO has also played a key role in bringing development partners together by facilitating donor meetings on our behalf. These roundtables with donors have helped to bring to the fore our preparation activities and the resource gaps that exist with the aim of enlisting their support. IDLO has further undertaken to assist in coordinating the support given by the various development partners by developing a resource matrix, which will then free up the Secretariat to focus on the technical aspects of the dispute resolution process.

The Committee values the immense support that we have received from IDLO and looks forward to a long and productive partnership with the organization.

5.4 Working with the International Commission of Jurists-Kenya (ICJ-K)

The support of ICJ-Kenya for the work of the JWCEP began at its inception in mid-2012. This support has been resolute throughout the life of the JWCEP. ICJ-Kenya with the generous funding of the French Embassy has played a key role in the development of the The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Petition) Rules by facilitating several validation workshops on the same. It was at these forums that comments on the rules were received and taken into account in arriving at the final draft.

ICJ-Kenya also hosted a round table meeting with the media on the state of preparedness of the Judiciary for elections in conjunction with InterNews in November 2012.

Furthermore, ICJ has been instrumental in the training programmes of the Judiciary. ICJ has not only attended these trainings, but it has also assisted the JWCEP in getting resource persons to facilitate certain sessions at the trainings.

Moreover, for the training of magistrates and legal researchers, ICJ attended meetings organized by the JWCEP to validate the facilitator's manual that would be used by the trainers for the regional trainings. Their comments were useful in arriving at a final draft of the manual.

The ICJ Case Digest on Election Petitions filed following the 2007 elections has been a useful and invaluable resource in training of judicial officers. The lessons learnt from the handling of cases in the past goes a long way in ensuring that any mistakes that occurred then are not repeated in this electoral cycle.



Workshop participants making a presentation

5.5 Working with the International Foundation for Electoral Systems (IFES)

The Committee would like to recognise the contribution of Dr George Carmona and Mr Luis Guia for their excellent presentations on international perspectives during the training workshops. The JWCEP's partnership with IFES spans its entire life in office. Their partnership has been instrumental in assisting the Committee to achieve its mandate. In relation to training, IFES has partnered with the JWCEP in many ways, including facilitating resource persons to take part in our trainings and publication of the programmes for the same. IFES also provided material from their library to be distributed to the participants at the trainings. It also engaged consultants to train the trainers for the magistrates and legal researchers' trainings carried out regionally.

IFES also graciously facilitated the publication of the interim report on the work of the Committee in September 2012.

The JWCEP has benefited from the wide range of experts that IFES has around the world. These experts have not only been instrumental in the trainings but also in the development of a case management system, which will assist in the monitoring of cases touching on the elections.

IFES also took part in the validation of the draft The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Petition) Rules 2013 as well as that of the Supreme Court (Presidential Election Petition) Rules 2013.

The JWCEP values the partnership of IFES in its work and looks forward to enhanced partnership with IFES in the fulfilment of its mandate.

5.6 Working with the Electoral Institute for Sustainable Democracy in Africa (EISA)

EISA has partnered with the JWCEP since it began its work. EISA has contributed immensely to the development of the The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Petition) Rules. It took part in the validation meetings on the rules and their comments were instrumental in arriving at a final draft.

EISA also partnered with the JWCEP and the Kenyatta University School of Law in hosting the Conference on Run-offs on the 14th and the 15th of January 2013.

EISA also took part in the media roundtable organized by ICJ at which it gave the perspective of the stakeholders on the state of preparedness of the Judiciary. It pointed out areas where they felt the Judiciary should do more to

prepare for the elections. EISA also took part in JWCEP trainings in November 2012 and January 2013.

5.7 Working with The Ford Foundation

The Ford Foundation has recently begun its partnership with the JWCEP. After attending one of JWCEP's donor roundtable meetings where a presentation on the Committee's work and future needs was made in December, the Ford Foundation began to partner with the JWCEP. In this regard, the Ford Foundation through Institute for Law and Environmental Governance (ILEG) facilitated the training of Land and Environment and Industrial Court Judges between the 17th and 20th of January 2012.

Even though the JWCEP's partnership with the Ford Foundation has just begun, the Committee looks forward to a fruitful partnership with them in the months ahead.

5.8 Working with the GIZ

GIZ began their partnership with the JWCEP in December 2012. GIZ facilitated the development of a facilitator's manual and participant's handbook for the training of magistrates and legal researchers starting in December 2012. It engaged the consultants who worked on the content, hosted the validation meeting of the manual and facilitated the printing of the same. The manuals and participant's handbooks were printed and distributed in the regions and used for the regional trainings between the 20th and the 27th of January 2013.

Following the successful conduct of the trainings, GIZ also hosted a debriefing session with the trainers. The debriefing session offered a forum for the sharing of experiences on the trainings as well as giving suggestions on how the manual could be improved before printing of its final version.

The forum was also very useful to the JWCEP because it enabled the Committee members to receive feedback on how they can make the dispute resolution process more effective. The GIZ is also funding the training of ICT personnel on the case management system developed by the Committee in conjunction with the ICT department. It have also provided 47 laptops to the Judiciary to be used in the 47 counties for purposes of case management. The training is taking place between the 25th Feb and the 1st March 2013. The JWCEP is immensely grateful for the generous support of GIZ towards its work.

GIZ is currently looking into future support for the Committee.

5.9 The National Council for Law Reporting (NCLR)

The NCLR is a semi-autonomous state agency (SAGA) established under the National Council for Law Reporting Act (Act No. 11 of 1994) with the Judiciary as its parent Ministry. As one of the recognised leading publishers of public legal information in the continent and beyond, the NCLR seeks to provide access to public legal information in order to aid the administration of and access to justice, advance the knowledge and practice of the law and the development of jurisprudence.

NCLR's work is crucial in fulfilment of JWCEP's public engagement mandate. The NCLR's website (www.kenyalaw.org) has proved to be a vital resource not just as a source of both legislation and case law on elections but also in the publication of the work of the Committee. Key among the documents posted on the website include the legislative framework on elections including the Supreme Court(Presidential Election) Rules, Elections (Parliamentary and County Election Petition) Rules, 2013 and the Interim Report of the JWCEP. The Council has also published a CD-ROM on electoral law which was disseminated to all judges and stakeholders that attended the EDR trainings in November. The Case Digest on Election Petitions also published by the Council has proved quite useful not just to the public at large but also to the Committee's research.

Most recently, the Council has undertaken to publish a compendium on matters touching on the just concluded party nominations that have been developed by the Committee's legal researchers. JWCEP hopes that the linkage of the Committee with the public through dissemination of information on its work will not only bolster transparency but also serve to assure the public that the judiciary is ready to handle any hurdles and efficiently conclude election disputes in the wake of the elections as called upon under the law.



Background

PUBLIC ENGAGEMENT

6.0 Background

The last mandate as outlined in the JWCEP's final term of reference is aimed at advising the Judiciary on the information that needs to be developed and disseminated to the public on the avenues open to it to pursue electoral disputes and the approaches that will be employed.

There is recognition that the public are the consumers of the services that the Judiciary offers. Indeed the Constitution makes it clear that judicial authority is derived from the people of Kenya and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution 2010. It is therefore very important that the public is in touch with the work not just of the JWCEP, but of all constitutional institutions and offices.

6.1 Public Engagement Initiatives

The JWCEP's work is especially important in preparing the Judiciary for elections. Indeed the Committee considers this to be a very important part of

its mandate. Taken in line with the events succeeding the previous general elections, it is very important that the public is confident of the ability of the Judiciary to handle post-election disputes in the wake of the 2013 elections.

To this end, the JWCEP has undertaken several activities aimed at increasing public confidence.

Firstly, the JWCEP has taken steps to engage actively with the LSK on the development of election petition rules. This came out of the realization that it is the advocates who would interact widely with the rules in the hearing and determination of election petitions and as a result, where their buy-in was not obtained, they could pose the largest problem to the expeditious hearing and disposal of election petitions. The draft rules were therefore sent to all the advocates through the LSK mailing list with a view to getting them to familiarize themselves with the same and getting their comments.

In addition, the LSK was invited to take part at validation workshops both on the The Elections (Parliamentary and County Elections) Petition Rules, 2013 (Election Petition) Rules and the Supreme Court (Presidential Election Petition) Rules and their comments on the draft rules were taken into consideration in arriving at a final draft for publication. It is hoped that once the cases are filed, their appreciation of the rules will make it easier for them to comply with the strict timelines that are set out therein, with the end result that effective and efficient dispute resolution is achieved.

The JWCEP has also taken this partnership further by engaging with the LSK so as to have practitioners taken through the new electoral regime in anticipation of electoral dispute resolution in 2013. During consultations with the LSK Council, it was agreed to have 5 Continuous Legal Education (CLE) events focused on the elections. The Committee organized for Judges of the High Court to make presentations at these forums to engage with advocates on what the election petition rules provide and what will be expected of them once they file cases in court. The CLE events were held in various parts of the country at which the Committee was represented. The JWCEP is therefore satisfied that advocates are well-placed to assist the court in the effective and efficient handling of electoral disputes in April 2013.

On the 24th of September 2012, the JWCEP hosted a breakfast meeting with news editors attended by the CJ. This was as a result of the realization of the importance of the media to the work of the Committee and particularly in raising public awareness on the preparation activities of the Judiciary. This awareness is key in increasing public confidence in the working of the Judiciary and in its ability to play its rightful role in electoral dispute resolution.

The JWCEP took part in a media roundtable conference on the Judiciary's preparedness to handle electoral disputes on the 2nd of November 2012. The roundtable, which was hosted by ICJ-Kenya and Inter-News Agency, was aimed at providing an update to regional and vernacular radion stations on the work of the JWCEP in preparing the country for electoral dispute resolution. It gave the media an opportunity to raise specific questions on Judiciary preparation activities.

The JWCEP also, in conjunction with the IEBC, the Registrar of Political Parties (RPP) and the National Democratic Institute (NDI), organized a forum with political parties with the aim of engaging with the parties on the Supreme Court (Presidential Election Petition) Rules in on the 10th of January 2013. In addition, the draft rules were published in national newspapers on the 11th of January 2013.

Electoral Institute for Sustainable Democracy Africa (EISA) in conjunction with the Kenyatta University School of Law, the JWCEP organized a conference titled, 'The International Conference on Elections March 2013: Imminent Debates in the Event of a Presidential Election Run-off' on the 14th and 15th of January 2013. This conference, which was graced by the presence of the immediate former president of Zambia, His Excellency President Rupiah Banda, brought together participants not just from Kenya but also other African countries. It provided a forum to brainstorm on the possible outcomes of a presidential election and assess how prepared the country is for a possible second round of elections. It also served to remind the media and the public by extension that the Judiciary and the IEBC are considering every possibility in preparing the country for elections.

The JWCEP has continued to engage very actively with the public. On the 29th of January 2013, Justice David Majanja was the main speaker at a public lecture organized by the Riara Law School on the elections. The talk, which was titled 'Election Preparedness: Judging the March 4 General Elections' was well received both by the faculty and the members of the public who were present.



On 22nd Feb 2013, Justice Maraga attended a forum for gubernatorial candidates at the Great Rift Valley Lodge organized by the The Transitional Authority to appraise the candidates on the steps the Judiciary has taken to prepare for the elections. The JWCEP has also had meetings with the EU Election Observation Team and with a representative of the Carter Foundation. The international community has taken a keen interest in the elections partly because of the wider impact that democracy in Kenya has on the entire East African region. The international community has expressed its satisfaction with the preparation activities undertaken thus far and we look forward to a favourable report in the wake of the elections.

Since the JWCEP is required to advise the Judiciary on the information that needs to be disseminated to the public on the avenues open to it to pursue electoral disputes, the Committee has undertaken, in conjunction with the Directorate of Public Affairs of the Judiciary, to prepare and publish pamphlet on frequently-asked questions on electoral dispute resolution. These questions will assist in simplifying electoral laws and procedures for the public, thus empowering them to engage the system as and when an electoral dispute arises. These questions will also be published in the daily newspapers with national circulation.

6.2 The Kuvuka Kuvuka initiative

The initiative was geared towards promoting a peaceful and united Kenya leading up to the 4th March 2013 general elections and beyond. It was built upon the success of the 2007 *Vijana Tugutuke* initiative with a vision to provide opportunities to Kenyans to exercise their civic duty beginning with the registration process.

The initiative, which relied on art and entertainment to draw crowds to the registration venues, continued over the 30 day registration period from 19th November to 18th December 2012 in all the major towns across the country. Among its objectives were to:

- create a dissemination network for information on the civic duties;
- deliver and sustain an impassioned message for free, fair, inclusive and peaceful elections;
- create a movement of youth committed to knowledgeable and issue-based voting;
- create a club, “WENYENCHI”, detailing a clear description of the identity of the true Kenyan patriot under the new dispensation with participation from a wide group of communities.

The JWCEP nominated Hon. A.K. Mwigigi to address the youth and participants at the event held on 18th December 2012 at the Uhuru Park, Nairobi with the aim of passing the message that the Judiciary is ready to handle election disputes, election petitions and election-related offences before and after the 4th March 2013 general elections. He was accompanied by Hon Ithuku, Joan Gitia and other members of staff.

As part of the JWCEP's media engagement strategy, the Committee will continue to keep the public informed of its activities through infomercials, editorial supplements and talk shows.







Justice Smokin' Wanjala presenting interim report to Chief Justice, September 2012





Background

Lessons Learnt
from Election
Dispute
Resolution (EDR)
Trainings

Lessons Learnt
from the Hearing
and Determination
of Cases Touching
on Elections

LESSONS LEARNT

7.0 Background

Since its inception by the Chief Justice on 10th of May 2012, the JWCEP has initiated and pursued diverse activities in the pursuit of its mandate. Whereas it has enjoyed remarkable success in the process, the JWCEP has also encountered numerous challenges. In all of this, the JWCEP has garnered some key lessons that are apt to inform all future initiatives of the same nature. These key lessons are distilled in the narrative below.

7.1 Training of Trainers (TOT)

The JWCEP with the support of IFES held a training of trainers' event for Judges and Magistrates from 8th - 11th of November 2012. Among the key lessons from the facilitators was that:

- All learning methodologies have benefits, and it is the role of the facilitator to carefully select the most appropriate method.
- A good facilitator appreciates the participants, and is careful not to create or express any bias against any of them participants or anyone else.
- The facilitator should set the tone and take charge.
- It is also important to create variety in presentation to get attention e.g. beginning with a quote or a story etc.

7.2 Lessons Learnt from Training of Judges

From the training of Judges of the High Court and Court of Appeal on 11th - 18th of November 2012, feedback on lessons learnt was that:

- Members of the Judiciary should be prepared to ascertain the truthfulness of evidence. Any decision not exhibiting fearlessness risks eroding the confidence of the public and may lead to anarchy. It is of paramount importance that the Courts do not lose sight of justice. The Courts must exhibit the principle of equality before the law and equal protection of the law for all those who come before court.
- Judicial officers should read the case file first before conducting a pre-trial conference in order to ensure that they are well acquainted with the pleadings before taking charge of a pre-trial conference.
- During trial, the proceedings should be limited to the issues defined during pre-trial.
- The Committee anticipates that there could be up to 500 cases arising out of the 4th March 2013 elections. To ensure efficient and speedy delivery of justice, a judge may be assigned two or three petitions, which would help ensure that all petitions are dealt with within the stipulated six months.
- The personal security of judicial officers is a matter of serious concern. There should be mechanisms of securing judicial premises and officers when trying election petitions. This also applies to the Judiciary support staff as well as the court records.
- The main objective of the courts is the expeditious disposal of election petitions. Elections are not and should not be the ordinary business of the Courts. It is in the interest of all parties concerned that all election cases are heard and determined within a proper period as stipulated.

7.3 Lessons Learnt from Training of Magistrates and Legal Researchers

The Trainers consisting of Judges and Magistrates who attended the Training of Trainers from 8th - 11th of November 2012 facilitated the Magistrates and legal researchers training in January. Their general feedback was that:

- All the training methods they were taught came in handy in engaging participants and enabling them have a personal grasp of EDR issues.
- The participants were concerned that the public was not aware of the Election Petition Rules and it was suggested that the JWCEP comes up with a list of Frequently Asked Questions (FAQs) which the Committee has already embarked on.

From the trainings of Magistrates and legal researchers on the 20th-27th of January 2013, the facilitators administered questionnaires and requested feedback from participants on how the Judiciary can improve its preparedness for the forthcoming 4th March General Elections. Feedback from the participants was that:

- There should be clear criteria on the appointment of officers who will hear election petitions and the criteria should be communicated in advance.
- After the petitions are filed and the Judicial Officers to handle them have been selected, there should be a further training of the selected Bench to agree on a standard way of expeditiously handling those petitions.
- It is important that security for the judges and magistrates selected to hear election petitions should be guaranteed and such security should extend to their families.
- Further, that each judge/magistrate selected to hear election petitions should be provided with adequate support staff.
- There was also a proposal that the LSK and other stakeholders such as the IEBC should also be trained on election petitions.
- It was also thought prudent that the CJ should issue direction on whether, given the timelines, sessions can be conducted over weekends.
- It was also recommended that there should also be a team of election researchers.

7.4 Lessons Learnt from the Hearing and Determination of Cases Touching on Elections

The High Court has traditionally been seen as the ultimate arbiter in electoral disputes. This role was further cemented by the fact that there were no administrative tribunals vested with jurisdiction to arbitrate over election-related disputes.

The public still sees the High Court as the primary dispute resolution forum. The court declined to hear a large number of pre-poll disputes for the reason that parties had not exhausted the dispute resolution mechanisms established by law for this purpose. It is now firmly established by precedent that where a statute has established a clear procedure for dispute resolution, that procedure must be followed and the court will only intervene where it is shown that that process has failed.

The Judiciary has already set the pace for the efficient and effective electoral dispute resolution. In 2012, the High Court successfully determined 136 constituency delimitation cases within a record time of one month after hearing and within the constitutionally mandated period. Delimitation being the first stage in the electoral process, it is anticipated that this success will be replicated in other election-related cases. The courts also heard and determined over 50 nomination cases arising from IEBC decisions in a record 5 days. The famous integrity case seeking to disqualify certain presidential candidates from vying for elections, being one of the pre-election cases was heard and a judgment delivered within one week.

7.5 Lessons Learnt from Election Dispute Resolution (EDR) Cases

- The Committee noted that many of the disputes were filed in the High Court before exhausting the jurisdiction given to the IEBC's Nominations Dispute Resolution Committee (NDRC) and the Political Parties Dispute Tribunal (PPDT) over pre-poll petitions. The court therefore referred many disputes back to the IEBC for determination.
- The first general elections under the Constitution presented special challenges regarding the election timetable. Party nominations were held too close to the elections, leaving little time for resolution of disputes. This put a strain both on the NDRC and the High Court. The nominations were held too close to the elections. This put a strain on both the NDRC and on the judges conducting the reviews.
- The jurisdiction of the High Court in relation to the decision of the IEBC and PPDT is to inquire into the procedure of decision-making by these bodies rather than a merit review of their decisions. The court

is obligated to respect the decisions of these bodies where they are made in good faith and where the procedures laid down in law have been followed. A summary of the election-related cases determined by the High Court can be found at www.kenyalaw.org.





Background

GOING FORWARD

8.0 Background

The JWCEP is pleased with the progress made thus far. However, the JWCEP is keen not to rest on its laurels. The work of the Committee is far from finished. It is for this reason that the JWCEP is undertaking the following activities, among others.

8.1 Calendar of Events

The following table depicts the JWCEP February 2013 - April 2014 calendar of events.

FEBRUARY 2013

- Training of 45 ICT Officers on e-based case management and equipping them with laptops and modems- 17th-23rd February 2013.
- Technical support and capacity building for JWCEP Secretariat.
- Setting up a Call Centre manned by legal researchers dedicated to the selected Bench to put in calls on emerging research needs, Feb-March 2013.
- Unveiling the media/communication plan for JWCEP (Supplement, editorials, Infomercial Talk Shows, Presenter mentions, 45 sec advert talk shows, link with websites to media houses, fliers and brochures, peace caravans for targeted messaging in hot spots, agency fee, T.V adverts on penalties for election offences (using the Ministry of Transport model on new traffic offences)- end of February 2013.
- Launch of the Pre-Election Report of JWCEP – end of February 2013.

MARCH 2013

- Training of Deputy Registrars & Executive Officers March 2013.
- Training of 15 Registrars on administrative issues arising towards preparation for an effective EDR- 7th-9th March 2013.
- Training the new Court of Appeal Judges and about 15 Judicial Officers who missed the EDR trainings in Nov 2012 and January 2013.
- Technical retreat for JWCEP on administrative issues arising on EDR- March 2013.

APRIL 2013

- Preparation & Publication of report on Presidential Petition (in case there will be a Petitioner).
- Colloquium for the Selected Bench-April 2013 (50 Judges, 50 Magistrates, 50 Researchers) (100 Clerks, one for each Judge and Magistrates, 100 Secretaries, one for each Judge and Magistrates).

Note: Timelines are indicative only

MAY-OCT
2013

- Effective monitoring and evaluation of the progress of election petitions to flag out potential areas of delay and difficulty (regional visits by JWCEP, administering questionnaires, focus group discussions)- May-October 2013.
- Run-off Report- Development and publication of report on run-off in case there will be a petitioner- May-October 2013.
- Debrief of the Selected Bench on lessons learnt- September 2013.
- Debrief for the researchers, secretaries, clerks and lessons learnt- September 2013.

OCT 2013
-APRIL 2014

- Monitoring and evaluation of appeals filed after petitions.
- Technical Retreat of JWCEP on development and publication of the final report on all appeals arising from Election Petitions- April 2014.

Note: Timelines are indicative only

APPENDICES

- **Chief Justice's Memo on the Judiciary and March 2013 General Elections**
- **The Elections (Parliamentary and County Elections) Petition Rules, 2013**
- **Frequently Asked Questions (FAQs)**
- **Case Management Time-Table For Election Petitions**

APPENDIX 1:

CHIEF JUSTICE'S MEMO ON THE JUDICIARY AND MARCH 2013 GENERAL ELECTIONS

JUDICIARY

MEMO

FROM: THE CHIEF JUSTICE & PRESIDENT, SUPREME COURT OF KENYA

TO: ALL STAFF, THE KENYA JUDICIARY

DATE: JANUARY 16, 2013

REF: CJ. 172

SUBJECT: THE JUDICIARY AND MARCH 2013 GENERAL ELECTIONS

The 2013 General Election will be unprecedented in scale as well as complexity. The Judiciary has taken a number of steps to prepare for the handling of electoral disputes and petitions arising in this electoral cycle, all of which fall within the wider Judiciary Transformation carried under Judiciary Transformation Framework (JTF), and aimed at increasing public confidence in the institution. In order to meet this challenge, one of the measures I undertook in May 2012 was to appoint the **Judiciary Working Committee on Election Preparations** ("Working Committee") whose mandate was, amongst others, to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election-related disputes.

Disputes and other matters for adjudication occur across the electoral cycle from the nomination process through to the announcement of election results and the election petitions filed thereafter. The resolution of these disputes are of huge public interest and go to the very root of our democracy. It is therefore imperative that the Judiciary deals with these matters with due expedience and efficiency. Failure to do so will

negatively impact the entire electoral process as well as diminish the public's confidence in this institution.

One of the litmus tests for our transforming institution will be the ability to handle electoral disputes and, more particularly, election petitions. Under the new, devolved political dispensation, over 1800 electoral seats will be contested across constituencies, counties and county assembly wards and as a result, we expect an unprecedented number of disputes and cases dealing with all aspects of elections.

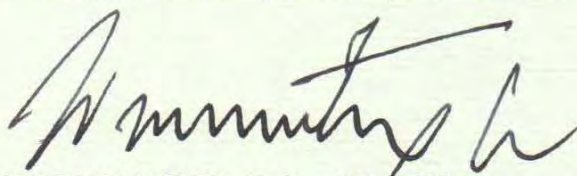
Through the Working Committee, the Judiciary is taking concrete steps towards addressing this challenge including the training of judicial officers, review and development of electoral legislation and regulations, stakeholder engagement and public outreach. Additionally, the scale of this task must be reflected upon and internalized by all judicial officers. It is imperative that we are well equipped, organized and prepared to deal with election petitions.

In order to streamline the process of determination of election disputes, I propose the following measures;

1. All judicial officers are directed to prioritize all disputes touching on elections, whether **directly or indirectly**, civil or criminal, **which have** a bearing on the elections. These **matters** should be dealt with urgently and expeditiously bearing in mind the timelines provided by the election statutes in the electoral cycle.
2. In view of the disputes we anticipate **both** before and after the elections, all judicial officers **will have an extra work load, whether or not they are appointed to the electoral bench**. All judicial officers **are therefore** expected to take steps towards rationalizing their diaries in anticipation of the election petitions and disputes following the March 2013 election.

3. Judicial officers must also psychologically, mentally and physically prepare for the demanding task of considering a large number of election petitions within stringent timelines. A large number of judicial officers will be appointed to the electoral bench and probably placed to hear petitions outside their home stations. Considering the capacity of the Judiciary, the magnitude of the task and its paramount importance in the national interest, unless there are compelling reasons, no judicial officers will be granted annual leave between March to October 2013.

The Working Committee is working to ensure that we have a smooth process of electoral dispute settlement and you shall be informed from time to time should any developments occur.



DR. WILLY MUTUNGA, D.Jur, SC, EGH
CHIEF JUSTICE/PRESIDENT,
SUPREME COURT OF KENYA

Appendix 2:

THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

(Legislative Supplement No. 12)

LEGAL NOTICE NO. 44

THE ELECTIONS ACT

(No. 24 of 2011)

THE ELECTIONS (PARLIAMENTARY AND COUNTY
ELECTIONS) PETITION RULES, 2013

ARRANGEMENT OF RULES

Rule

PART I—PRELIMINARY

1—Citation.

2—Interpretation.

PART II—APPLICATION, OBJECTIVES OF RULES, ETC

3—Application of the rules.

4—Objective of Rules.

5—Duty of court and parties.

PART III—CONSTITUTION OF AN ELECTION COURT AND
APPOINTMENT OF ADVOCATES

6—Constitution of an election court.

7—Appointment of advocate by Respondent.

PART IV—PRESENTATION AND COMMENCEMENT OF
ELECTION PETITIONS

8—Manner of filing of petition.

9—Commission to be Respondent in every petition.

10—Contents and form of an election petition.

11—Security by deposit of money.

12—Affidavits by witnesses.

13—Service of Respondent.

14—Response to petition.

15—Affidavits by Respondent.

PART V—CASE MANAGEMENT

16—List of petitions.

- 17—Pre-trial conferencing and prohibition of delayed interlocutory applications.
- 18—Consolidation of election petitions.
- 19—Time and place of trial and postponement of start of trial.
- 20—Extension of time.
- 21—Returning officer to deliver ballot boxes.
- 22—Adjournment and continuation of trial.
- 23—Withdrawal of petition.
- 24—Copies of and notice of the application for withdrawal of petition.
- 25—Notice of time and place of hearing of application.
- 26—Substitution of another Petitioner.
- 27—Death of Petitioner.
- 28—Application to be substituted as Petitioner.
- 29—Death, resignation of, or notice not to oppose by elected person.
- 30—Abatement of petition.
- 31—Countermanding notice of trial, etc.

PART VI—SCRUTINY, RECOUNT, ETC

- 32—Petitioner may request for recount or examination of tallying only.
- 33—Scrutiny of votes.

PART VII—COSTS AND DEPOSITS

- 34—Costs.
- 35—Taxation and recovery of costs.
- 36—Return of money deposited.

PART VIII—MISCELLANEOUS

- 37—Attorney General and Director of Public Prosecutions may attend trial.
- 38—Power of court to issue administrative orders.
- 39—Practice directions by the Chief Justice.

SCHEDULE

THE ELECTIONS ACT

(No. 24 of 2011)

IN EXERCISE of the powers conferred by section 96 of the Elections Act, 2011, the Rules Committee makes the following Rules:—

THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

PART I—PRELIMINARY

1. These Rules may be cited as the Elections (Parliamentary and County Elections) Petition Rules, 2013.

Citation.

2. In these Rules, unless the context otherwise requires—

Interpretation.

“Act” means the Elections Act, 2011;

No.24 of 2011.

“Commission” means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

“direct service” includes personal service on the Respondent or on a duly authorized agent appointed by the Respondent;

“Petitioner” means a person who files an election petition to the election court under the Constitution or under the Act in accordance with these Rules;

“Registrar” means—

- (a) the Registrar of the High Court, and includes a deputy registrar; and
- (b) an executive officer, where the petition is filed in a magistrate’s court;

“Respondent” in relation to an election petition, means—

- (a) the person whose election is complained of;
- (b) the returning officer;
- (c) the Commission; and
- (d) any other person whose conduct is complained of in relation to an election.

PART II—APPLICATION, OBJECTIVES OF RULES, ETC

3. These Rules apply to election petitions in respect of—

Application of the rules.

- (a) parliamentary elections; and
- (b) county elections.

4. (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.

Objective of Rules.

(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the

provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).

(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

5. (1) For the purpose of furthering the overriding objective specified in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—

Duty of court and parties.

- (a) the just determination of the proceedings; and
- (b) the efficient and expeditious disposal of the petition and in any case not beyond the timelines provided in the Constitution and the Act with respect to election petitions.

(2) The court may, where a party has breached any requirement of these Rules, issue orders, and impose penalties, as the court may consider just and fit including an order for payment of costs.

PART III—CONSTITUTION OF AN ELECTION COURT AND APPOINTMENT OF ADVOCATES

6. (1) A court shall be properly constituted, for purposes of hearing—

Constitution of an election court.

- (a) an election petition in respect of an election to Parliament or to the office of governor, if it is composed of one High Court Judge; or
- (b) an election petition in respect of an election to a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.

(2) The Chief Justice may—

- (a) in consultation with the Principal Judge of the High Court, designate such judges; and
- (b) designate such magistrates,

as are necessary for expeditious disposal of election petitions.

(3) The Chief Justice shall publish the name of the Judge or Magistrate designated under sub-rule (2) in the Gazette and in at least one newspaper of national circulation.

(4) A judge or a magistrate designated under sub-rule (2) may not, for the duration of the election petition, be engaged in any other court matter except a matter for which a ruling or judgment was pending and the date of which ruling or judgment is within the period before the Judge or Magistrate concludes election the petition.

7. (1) A person elected may, at any time after the election, file at the office of the Registrar a notice in writing signed by the person or on the person's behalf—

Appointment of advocate by Respondent.

- (a) appointing an advocate to act in case there should be a

petition against the person; or

(b) stating the intention of that person to act in person.

(2) The person giving notice under sub-rule (1) shall give an address in Kenya at which notices addressed to the person may be served.

(3) Where no notice is given by the person elected in accordance with sub-rule (1), all notices and proceedings may be served by leaving them at the office of the Registrar.

(4) The Registrar shall cause to be kept a record of all addresses and the names of advocates given under sub-rule (1) and (2), which record shall be open for inspection by any person during official working hours.

PART IV—PRESENTATION AND COMMENCEMENT OF ELECTION PETITIONS

8. (1) An election petition shall—

Manner of filing of
petition.

(a) be filed by presenting the petition to the office of the Registrar or to a designated officer of the court; and

(b) be in Form EP 1 set out in the Schedule.

(2) The Registrar or a designated officer of the court to whom the petition is delivered shall acknowledge receipt of the petition in Form EP 2 set out in the Schedule.

(3) An election petition filed under this rule shall be accompanied by a fee to be determined by the Registrar.

9. The Commission shall—

Commission to be
Respondent in every
petition.

(a) be a Respondent in an election petition filed under the Act; and

(b) be served with an election petition filed pursuant to these Rules in the manner provided under rule 13 (2).

10. (1) An election petition filed under rule 8 shall state —

Contents and form
of an election
petition.

(a) the name and address of the Petitioner;

(b) the date when the election in dispute was conducted;

(c) the results of the election, if any, and however declared;

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the Petitioner which shall be the address for service.

(2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.

(3) An election petition shall—

- (a) be signed by the Petitioner or by a person duly authorized by the Petitioner;
- (b) be supported by an affidavit by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner; and
- (c) be in number of copies as would be sufficient for the court and all Respondents named in the petition.

(4) The petition shall conclude with a prayer, requesting the court to make the appropriate relief which may include—

- (a) a declaration on whether or not the candidate whose election is questioned was validly elected;
- (b) a declaration of which candidate was validly elected; or
- (c) an order as to whether a fresh election should be held or not.

11. (1) Within ten days of the filing of an election petition under these Rules, a Petitioner shall deposit security for the payment of costs that may become payable by the Petitioner as provided under sections 78 (2) (b) and 78 (2) (c) of the Act.

Security by deposit of money.

(2) The security of costs under sub-rule (1) shall—

- (a) be paid to the Registrar;
- (b) be for payment of costs, charges and expenses payable by the Petitioner; and
- (c) be vested in, and drawn upon from time to time by, the Registrar for the purposes for which security is required by these Rules.

(3) The Registrar shall—

- (a) issue a receipt for any such deposit;
- (b) shall file the duplicate of the receipt in a record kept by him; and
- (c) keep the record, open for inspection by any party concerned, in which shall be entered from time to time the amount and the petition to which it relates.

12. (1) A Petitioner shall, at the time of filing the petition, file an affidavit sworn by each witness whom the Petitioner intends to call at the trial.

Affidavits by witnesses.

(2) The affidavit under sub-rule (1) shall—

- (a) state the substance of the evidence;
- (b) be served on all parties to the election petition with sufficient copies filed in court; and
- (c) form part of the record of the trial and a deponent may be cross-examined by the Respondents and re-examined by the

Petitioner on any contested issue.

(3) Subject to sub-rule (4), a witness shall not give evidence on behalf of the Petitioner unless an affidavit is filed in accordance with this rule.

(4) A witness for the Petitioner who fails to deliver an affidavit as required by this rule shall not be allowed to give evidence without the leave of the court.

(5) The court shall not grant leave under sub-rule (4) unless sufficient reason is given for the failure.

(6) The provision of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.

L.N. 151 of 2010.
Cap.15.

13. (1) An election petition shall be served by the Petitioner on the Respondent by —

Service on the
Respondent.

- (a) direct service; or
- (b) publication in a newspaper of national circulation.
- (2) Service on the Commission shall be by —
 - (a) delivery at the head office of the Commission;
 - (b) delivery at such other office as the Commission may notify; or
 - (c) publication in a newspaper of national circulation.

(3) Where a petition is served by publication in a newspaper as provided under sub- rules (1)(b) and (2) (c), the advertisement shall be sufficient if it is —

- (a) in Form EP 3 set out in the Schedule and contains, as a minimum, the details required in that Form;
- (b) is of at least font size twelve; and
- (c) is captured in dimensions of not less than ten by ten centimetres.

14. (1) Upon being served with an election petition under rule 13, the Respondent may oppose the petition by filing and serving a response within a period of not more than fourteen days upon service of the petition.

Response to petition.

(2) The response to an election petition shall be in form of an answer to the petition and shall be in Form EP 4 set out in the Schedule.

(3) A Respondent who has not filed a response as provided under this rule shall not be allowed to appear or act as a party against the petition in any proceedings.

15. (1) A Respondent shall at the time of filing a response to the petition, file an affidavit sworn by a witness whom the Respondent intends to call at the trial, which affidavit shall set out the substance of the evidence.

Affidavits by
Respondent.

(2) Each affidavit shall be served on all parties to the petition including all Petitioners in the same petition and the Respondents.

(3) The affidavit shall form part of the record of the trial and a deponent may be cross-examined by the Petitioners and re-examined by the Respondent.

(4) Subject to sub-rule (5), a witness shall not give evidence for the Respondent unless an affidavit sworn by the witness, setting out the substance of the evidence, in sufficient copies for the use of the court and the Petitioner, is filed with the response as required by this rule.

(5) A witness for the Respondent who fails to deliver an affidavit under sub-rule (2) or (4) shall not be permitted to give evidence without the leave of the court.

(6) The court shall not grant leave under sub-rule (5) unless sufficient reason is given for the failure to deliver.

(7) The provision of Order 19 of the Civil Procedure Rules, 2010 and the Oaths and Statutory Declarations Act shall apply to affidavits under this rule.

L.N. 151 of 2010.

Cap. 2.

PART V—CASE MANAGEMENT

16. (1) The Registrar shall, upon receipt of a petition, enter the name of the Petitioner, Respondents and the advocates of the Petitioners and Respondents and the addresses to which notices may be sent, if any, in a register kept by the Registrar for that purpose.

List of petitions.

(2) The list may be inspected at the office of the Registrar at any time during official working hours, and shall be affixed for that purpose on a notice board designated “The Elections Act-Elections Petitions” and affixed at the office of the Registrar.

17. (1) Within seven days after the receipt of the last response to a petition, the court shall schedule a pre-trial conference with the parties in which it shall—

Pre-trial conferencing and prohibition of delayed interlocutory applications.

- (a) frame contested and uncontested issues in the petition;
- (b) analyse methods of resolving contested issues;
- (c) consider consolidation of petitions in cases where more than one petition is filed with respect to the same election;
- (d) deal with all interlocutory applications and decide on their expeditious disposal;
- (e) confirm the number of witnesses the parties intend to call;
- (f) give an order for furnishing further particulars;
- (g) give directions for the expeditious disposal of the suit or any outstanding issues;
- (h) give directions as to the place and time of hearing the petition;
- (i) give directions as to the filing and serving of any further affidavits or the giving of additional evidence;

(j) limit the volume or number of pages of any copies of documents that may be required to be filed; or

(k) make such other orders as may be necessary to prevent unnecessary expenses and to ensure a fair and effectual trial.

(2) The court shall not allow any interlocutory application made after the hearing of the petition has commenced if the interlocutory application is brought before the commencement of the hearing of the petition.

18. Where more than one petition is presented relating to the same election all such petitions shall be heard and determined as one petition, in as far as inquiry into the election is concerned.

Consolidation of election petitions.

19. (1) The court shall, by notice issued by the Registrar, specify the time and place of the trial of an election petition.

Time and place of trial and postponement of commencement of trial.

(2) The notice issued under sub-rule (1) shall be issued, not less than seven days before the date fixed for trial, by delivery at the address left by the Petitioner or Respondent with the Registrar, or if no such address has been left, by notice in the Gazette or by advertisement in a newspaper of national circulation.

(3) The court may, on the application of a party or on its own motion, for sufficient reasons, postpone the commencement of the trial of an election petition to a date specified by the court.

20. Where any matter is to be done within such time as provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done with such conditions as it may consider fit even though the period initially provided or granted may have expired.

Extension of time.

21. The Commission shall deliver to the Registrar—

Returning officer to deliver ballot boxes.

(a) the ballot boxes in respect of that election not less than forty-eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the petition.

22. (1) The court shall conduct trial proceedings, as far as reasonably practicable, on a day to day basis until trial is concluded.

Adjournment and continuation of trial.

(2) Despite sub-rule (1), the court in which the trial proceedings has commenced shall not be adjourned for more than five consecutive days.

(3) If a judge or magistrate hearing a petition is incapacitated by illness or other reasons during a trial under these Rules, the Chief Justice shall appoint another judge or magistrate, as the case may be, to continue and conclude the trial.

(4) Where another judge or magistrate takes over a petition, previously heard by another judge or magistrate, as the case may be, he

shall continue with the proceedings from where the previous judge or magistrate had left.

23. (1) An election petition shall not be withdrawn without leave of the court.

Withdrawal of petition.

(2) The court shall grant leave on such terms as to the payment of costs or as the court may consider fit and just.

(3) An application for leave to withdraw an election petition shall—

- (a) be in the Form EP 5 set out in the Schedule;
- (b) be signed by the Petitioner and his advocate;
- (c) state the grounds on which the application is supported; and
- (d) be filed at the office of the Registrar.

(4) The parties to the election petition and their advocates shall, before leave for withdrawal of an election petition is granted, produce affidavits stating the ground on which the petition is intended to be withdrawn.

(5) Despite sub-rule (4), a court may, on cause being shown, dispense with the affidavit of a person if it seems to the court on special grounds to be fit and just.

(6) Each affidavit shall state “to the best of the deponent’s knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the election petition.”

(7) Despite sub-rule (6), where a lawful agreement has been made with respect to the withdrawal of the election petition, the affidavit shall set out the terms of the agreement.

24. (1) The Petitioner shall serve the Respondent with a copy of the application to withdraw an election petition.

Copies of and notice of the application for withdrawal of petition.

(2) The Petitioner shall, publish in the Gazette, a notice of withdrawal of the election petition in Form EP 6 set out in the Schedule at the Petitioner’s own expense.

25. (1) The Registrar shall issue a notice in Form EP 6 set out in the Schedule, to a person who has given notice to the Registrar of their intention to apply to be a substituted Petitioner.

Notice of time and place of hearing of application.

(2) The notice issued under sub-rule (1) shall specifying the time and place for hearing of the application for withdrawal of an election petition as directed by the court.

26. (1) At the hearing of the application for withdrawal of an election petition, a person who is qualified to be a Petitioner in respect of the election to which the petition relates may apply to the court to be substituted, as Petitioner, in place of the Petitioner desirous of withdrawing the petition.

Substitution of another Petitioner.

(2) The court may substitute an applicant under sub-rule (1) as Petitioner; and may further, if the proposed withdrawal is in the

opinion of the court, induced by any corrupt bargain or consideration, by order direct that the security deposited on behalf of the original Petitioner shall remain as security for any costs that may be incurred by the substituted Petitioner, and that to the extent of the sum deposited as security the original Petitioner shall be liable to pay the costs of the substituted Petitioner.

(3) If no order is made under sub-rule (2) in respect of security by the original Petitioner, security of the same amount as would be required in the case of a new Petitioner, subject to the same conditions shall be payable by the substituted Petitioner before he proceeds with the petition and shall be paid by the substituted Petitioner within three days after the order of substitution.

(4) Subject to sub-rules (2) and (3), a substituted Petitioner shall stand in the same position, to the extent possible, and shall be subject to the same liabilities, as the original Petitioner.

(5) Where there is more than one Petitioner, an application to withdraw an election petition shall be made with consent of all the Petitioners.

27. (1) An election petition shall not abate merely by reason of the death of a sole Petitioner or of the survivor of several Petitioners.

Death of Petitioner.

(2) In case of the death of the sole Petitioner or of the survivor of several Petitioners, substitution of a new Petitioner shall be notified to the court within seven days of the notification of the death under sub-rule (1).

28. (1) A party or person interested to be substituted as a Petitioner shall give a notice of death of the Petitioner or of the survivor of several Petitioners in manner provided under rule 24.

Application to be substituted as Petitioner.

(2) An application for an order to be substituted as a Petitioner shall be made within seven days from the day of the notice issued under sub-rule (1) or such other time as the court may allow.

(3) A person who may have been a Petitioner in respect of the election to which the petition relates may apply to the court to be substituted as a Petitioner.

(4) The court may substitute as a Petitioner any such applicant who is desirous of being substituted and on whose behalf security, of the same amount is given as is required in the case of a new petition.

29. (1) If before the trial of an election petition, the person whose election is being contested—

Death, resignation of, or notice not to oppose by elected person.

(a) dies or vacates the seat; or

(b) gives notice in writing to the Registrar that he does not intend to oppose the petition,

the petition shall not abate but shall continue, whether or not any person applies to be admitted as a Respondent in the manner provided in this rule.

(2) The Registrar shall publish, in the Gazette, a notice stating that the person whose election is being contested has—

- (a) died or vacated his seat; or
- (b) given notice in writing that he does not intend to oppose the petition.

(3) A person who may have been a Petitioner, in respect of the election to which the petition relates, may apply to the court to be admitted as a Respondent to oppose the petition within ten days after the notice under sub-rule (2) has been published in the Gazette or on such other time as the court may allow.

(4) The notice under sub-rule (1) (b) shall —

- (a) be in writing;
- (b) be signed by the person whose election is being contested;
- (c) be filed at the office of the Registrar; and
- (d) be filed not less than six days before the day appointed for trial and shall exclude the day of leaving the notice.

30. An election petition shall abate if after seven days of the notice of withdrawal or of the death of a sole surviving Petitioner, no person has made an application to be substituted as new Petitioner.

Abatement of petition.

31. (1) The Registrar shall countermand a notice of trial where he receives a notice under rule 29 (1) before the trial commences.

Countermanding notice of trial, etc.

(2) The countermand shall be given in the same manner, with necessary modifications, as the notice of trial.

PART VI—SCRUTINY, RECOUNT, ETC.

32. (1) Where the only issue in the election petition is the count or the tallying of the votes received by the candidates, the Petitioner may apply to the court for an order to recount the votes or examine the tallying.

Petitioner may request for recount or examination of tallying only.

(2) The Petitioner shall specify in the election petition that he does not require any other determination except a recount of the votes or the examination of the tallies.

33. (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

Scrutiny of votes.

(2) Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.

(3) The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.

(4) Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of—

- (a) the written statements made by the presiding officers under the provisions of the Act;

- (b) the copy of the register used during the elections;
- (c) the copies of the results of each polling station in which the results of the election are in dispute;
- (d) the written complaints of the candidates and their representatives;
- (e) the packets of spoilt papers;
- (f) the marked copy register;
- (g) the packets of counterfoils of used ballot papers;
- (h) the packets of counted ballot papers;
- (i) the packets of rejected ballot papers; and
- (j) the statements showing the number of rejected ballot papers.

PART VII—COSTS AND DEPOSITS

34. (1) The court shall, at the conclusion of an election petition, make an order specifying — Costs.

- (a) the total amount of costs payable; and
- (b) the persons by and to whom the costs shall be paid.

(2) When making an order under sub rule (1), the court may —

- (a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and
- (b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.

35. (1) The Registrar shall tax costs of an election petition upon the order of the court in the same manner as costs are taxed in civil proceedings and in accordance with the Civil Procedure Act. Taxation and recovery of costs.
Cap. 21

(2) An order of the Registrar under sub-rule (1) shall be confirmed in the relevant court.

(3) The court may direct that the whole or any part of any moneys' deposited by way of security may be applied in the payment of taxed costs.

(4) There shall be paid in respect of all proceedings under these Rules the same court fees as are payable in respect of civil proceedings in the High Court or magistrate's court, as the case may be, in so far as the same are applicable.

36. (1) Money deposited under rule 11 shall, if and when it is no longer needed for security payment of costs, charges and expenses be returned or disposed of as justice may require by order of the court. Return of money deposited.

(2) The order may be made upon an application and proof that all just claims have been satisfied or sufficiently provided for as the court may require.

(3) The order may direct payment either to the party in whose name it is deposited or to any person entitled to receive it.

PART VIII—MISCELLANEOUS

37. The Attorney-General or the Director of Public Prosecutions or a person appointed by the Attorney-General or Director of Public Prosecutions, as the case may be, may attend the trial of an election petition.

Attorney General
and Director of
Public Prosecutions
may attend trial.

38. Despite any provision in these Rules the court may at any time before or during the trial issue any orders of an administrative nature, including—

- (a) an order to require written submissions; and
- (b) prescribing timelines for certain actions.

39. The Chief Justice may issue practice directions for the better carrying out of the provisions of these rules.

Power of court to
issue administrative
orders.

Practice directions
by the Chief Justice.

SCHEDULE

FORM EP I

(r.8)

IN THE HIGH COURT OF KENYA/IN THE MAGISTRATES COURT AT-----

THE ELECTIONS ACT, 2011

PETITION

Election for the (state whether Governor/Senator/Member of National Assembly/ member of county assembly) of
(state the respective county/constituency/ward)

The Petition of (state name of Petitioner(s))

Your Petitioners state that the election was held on the day
of,

20....., when X,Y and Z were candidates, and the returning officer has returned X
as being duly elected.

And your Petitioners say that (state the facts and grounds on which the Petitioners rely).

Wherefore your Petitioners pray that it be determined that the said X was not duly elected
and the election was void (or as the case may be).

Dated, 20..... (Signed) A.

Dated, 20..... (Signed) B

FORM EP 2

r.8(2))

ACKNOWLEDGEMENT OF RECEIPT OF AN ELECTION PETITION

Received on the day of, 20.....
 at the Registry of the High/Magistrates Court, a petition concerning the election of
 for purporting to be signed
 by..... (*insert the names of Petitioners*)
Registrar (or other officer to whom the *petition is delivered*)

FORM EP 3

(r.13 (2) (a))

SERVICE OF ELECTION PETITION BY ADVERTISEMENT

To:

of.....

Take notice that an Election Petition in regard to
 county/constituency/county assembly ward has been filed in the
Court at in EP No. of 20, in which
 you are named as Respondent/s. Service of the summons on you will be by means of this
 advertisement. A copy of the summons and the petition may be obtained from the court at
 (*insert postal address of registry*)

And further take notice that, unless you enter an appearance within days, the
 petition will be heard in your absence.

Dated the, 20..... (*signed*)

FORM EP 4

(r.14 (2))

IN THE HIGH COURT OF KENYA/IN THE MAGISTRATES COURT AT-----

THE ELECTIONS ACT, 2011

RESPONSE TO AN ELECTION PETITION

Election for the (*state whether
 Governor/Senator/Member of National Assembly/ member of county assembly*) of
 (*state the respective county/constituency/ward*)

The Response of (*state name of Respondent(s)*)

In response to the petition, the Respondent states that (*state the facts or grounds on which
 the Respondent(s) rely*).

Wherefore your Respondent prays that it be determined that the said
 (*name of candidate*) was duly elected and the election was
 valid (or as the case may be).

Dated, 20..... (Signed) A.

Dated, 20..... (Signed) B

FORM EP 5

(r.23 (2))

IN THE HIGH COURT OF KENYA/IN THE MAGISTRATES COURT AT-----

THE ELECTIONS ACT, 2011

APPLICATION TO WITHDRAW AN ELECTION PETITION

The petition of presented the
 day of, 20.....

The Petitioner applies for leave to withdraw the petition upon the following grounds
(state grounds). And the Petitioner prays that a day may be appointed for hearing the
 application.

Dated the 20..... *(signed)*

FORM EP 6

(r.24)

IN THE HIGH COURT OF KENYA/IN THE MAGISTRATES COURT AT.....

THE ELECTIONS ACT, 2011

NOTICE OF WITHDRAWAL OF AN ELECTION PETITION

In the election petition for the

Constituency/Ward/ in which is Petitioner and
 Respondent.

Notice is hereby given that the above Petitioner did on theday of
, 20 lodge at the office of the Registrar an
 application for leave to withdraw the election petition, of which application the following
 is a copy- *(attach copy)*.

And take notice that under the Elections (Parliamentary and County Elections) Petition
 Rules any person who might have been a Petitioner in respect of the said election may,
 within seven days after the date of publication of this notice, give notice in writing to the
 Registrar of the High Court of the intention on the hearing of the application to be
 substituted as a Petitioner.

Dated the 1st January, 2013.

ALNASHIR VISRAM,
Chairperson/ Rules Committee.

APPENDIX 3: FREQUENTLY ASKED QUESTIONS (FAQs)

- **Supreme Court (Presidential Election Petition) Rules, 2013**
- **Elections (Parliamentary and County Elections) Petition Rules, 2013**



REPUBLIC OF KENYA

THE JUDICIARY

ALL ABOUT ELECTION PETITIONS

FREQUENTLY ASKED QUESTIONS (FAQs)

SUPREME COURT (PRESIDENTIAL ELECTION PETITION) RULES, 2013

What are the Supreme Court (Presidential Election Petition) Rules, 2013?

These are rules that apply to a petition filed in relation to election to the Office of President.

What is the purpose of the rules?

The rules are meant to assist the public to understand the procedures for filing petitions challenging Presidential Elections and help the Supreme Court in case management. The rules set out steps and procedures to be followed within the timelines provided in the Constitution.

Who can file an Election Petition?

Any person may file a petition challenging the validity of a presidential election.

Where can an Election Petition be filed?

At the Supreme Court Registry, Supreme Court Building in Nairobi, after which the Registrar will, within **3 days** of filing of the petition publish it in the Kenya Gazette and a newspaper with national circulation.

What is the deadline for filing?

A petition must be filed within **seven (7) days** of the declaration of the results by IEBC in the Kenya Gazette.

What must they contain?

A petition shall set out the facts and grounds relied in support of relief claimed. It must also be signed by the petitioner and be accompanied by witness affidavits.

What is consolidation of petitions?

Where more than one petition is filed challenging the election of a president, they may be heard together for the sake of expediency.

How can the petition be served?

A petition including the affidavits shall be served by the petitioner on the respondent either directly or by publication in a newspaper with national circulation.

Who will hear the petitions?

The election court is constituted by at least 5 Judges of the Supreme Court.

What is the pre-trial conference?

It is a meeting between the judges and the lawyers involved in the election petition to narrow the issues in the suit, agree on what will be presented at the trial, and make a final effort to settle the case without a trial. The pre-trial conference shall be held nine days after the filing of the petition. **What are the scheduled timelines for the**

various pleadings?

On filing and service of a petition, the respondent may oppose the petition by filing and serving a response within **three (3) days** of service.

What is evidence by affidavit?

This means that the court will primarily consider the evidence filed by way of affidavit and only call a witness to be cross-examined where the court considers it necessary.

How will the cases be heard?

The hearing of the petition shall commence within two days of the pre-trial conference. The petition must be heard and determined within **14 days** of the date of filing. The petition shall be heard on a day-to-day basis until it is concluded. At the end of the hearing, the court may give its decision and reserve its reasons for a later date. The court must however give a summary of its decision at the end of the conclusion of the hearing.

Is there a right to appeal?

There is no right of appeal. The determination of the Supreme Court is final.

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2013

What are the Elections (Parliamentary and County Elections) Petition Rules 2013?

These are rules that govern the court procedure for filing, hearing and determination of Parliamentary and County election petitions. The overriding objective of the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.

Who can file an Election Petition?

Any person may file a petition challenging the validity of a Parliamentary or County election in the Court within the County or nearest to the County. A petition challenging the election of the President can only be filed in the Supreme Court.

How should an election petition be filed?

An election petition shall be filed in the Court within the County or nearest to the County by delivering the petition to the relevant court registry upon payment of requisite filing fees. In addition to the petition, the petitioner shall at the time of filing the petition also file an affidavit sworn by each witness setting out the substance of the evidence in support of the petition. The petitioner will not be permitted to call a witness unless an affidavit has been filed.

When is the deadline for filing?

An election petition shall be filed after **twenty eight (28) days** of the publication of the results by IEBC in the Kenya Gazette.

What must the petition contain?

The petition shall contain the following details;

- (a) name and address of the petitioner;
- (b) date when the election in dispute was conducted;
- (c) results of the election, if any, and however declared;
- (d) date of the declaration of the results of the election;
- (e) grounds on which the petition has been presented;
- (f) name and address of the advocate, if any, for the petitioner which shall be an address for service;
- (g) conclude with a prayer, requesting the court to make the appropriate relief sought by the petitioner; and be signed by the petitioner or by a person duly authorized by the petitioner.

In addition the petition shall be accompanied by an affidavit by the petitioner containing the grounds on which relief is sought and setting out the facts relied on by the petitioner.

Is the petitioner required to deposit security?

Section 78 of the Election Act, 2011 requires the petitioner to deposit security for costs within 10 days for filing of the petition. A petitioner seeking to challenge the election of a member of Parliament or a County Governor must deposit KSh500,000 while a petitioner seeking to challenge the election of a member of a County Assembly shall deposit KSh1 million.

How is the petition to be served?

A petition including the affidavits shall be served by the petitioner on the respondent by direct service which includes personal service on the respondent or his or her duly appointed recognized agent or by publication of the petition in at least on newspaper of national circulation.

The IEBC shall be a respondent to every petition and may be served by delivery of the petition at the head office of the Commission or such office as the Commission may notify or by publication in a newspaper of national circulation.

Where can one access the list of petitions?

The Registrar of the respective court is to publish a list of all petitions filed which list shall be open to inspection by the public.

What are the scheduled timelines for filing various documents?

On filing and service of a petition, the respondent may oppose the petition by filing and serving a response within **fourteen (14) days** of service together with replying affidavits. After this, the Judge or Magistrate is to hear and finally determine the matter within **6 months** of the date of filing of the petition.

Who will hear the petitions?

Each petition shall be heard by the Election Court which shall comprise:

- (a) In respect of a petition challenging the election of a Senator, Women Representative, Member of

Parliament & Governor, a High Court judge; or

- (b) In respect of a petition challenging the election of a County Assembly Representative, a magistrate designated by the Chief Justice.

Who selects the Bench?

The Chief Justice, in consultation with the Principal Judge of the High Court, shall select the High Court judges to hear the petitions. The Chief Justice shall also designate specific magistrates to hear petitions relating to County Assembly elections. The Chief Justice will publicize the selected bench in the Kenya Gazette and in at least one newspaper of national circulation.

What is the pre-trial conference?

After the filing of the petition and the responses to the petition, the court must schedule a pre-trial conference within **seven (7) days** of filing of the last response. The pre-trial conference is a meeting between the judicial officer, the lawyers and unrepresented parties involved in the election petition to narrow the issues in the suit, agree on the evidence to be presented and how it will be presented at the trial and make a final effort to settle the petition without a trial.

At this stage, the court may order the consolidation of petitions that relate to the same election and is also empowered to deal with all preliminary issues.

At the conclusion of the pre-trial conference, the court will issue directions on how the petition will be heard and determined. It is expected that all the applications will be dealt with at the pre-trial conference as the court shall not allow any further applications once the hearing of the petition begins.

How will the petition be heard?

The Court will hear the petition in accordance with the directions issued at the pre-trial conference. Once the hearing of the petition begins, the proceedings shall not be formally adjourned for more than **five (5)** consecutive days, but the trial shall, as far as reasonably practicable, be continued from **day to day** until it is concluded. However, the court may grant adjournment on sufficient reasons provided that the same shall not be for more than **seven (7) days**.

When is the petition expected to be concluded?

The Constitution and the Election Act, 2011 provides that an election petition challenging the election of a member of the National Assembly or a County election shall be heard and determined within **six (6) months** of the date of lodging the petition.

Is there a right of appeal?

Appeals from the decision of the Magistrates court on any matters of law shall be lodged at the High Court. Appeals from the High Court shall be to the Court of Appeal. In both instances the appeals shall be heard and determined **six (6) months** from the date of filing of the appeal.

WE ARE FULLY PREPARED, THIS IS HOW

1. The 2013 General Election will be the first under the Constitution, 2010. With Kenyans preparing to choose close to 2,000 individuals for public office, the election is unprecedented in both scale and complexity. In view of this, there is a reasonable expectation that there will be a substantial increase in the number of election petitions.
2. On May 10, 2012, the Chief Justice appointed a special committee, the Judiciary Working Committee on Election Preparations (JWCEP) to assist the Judiciary prepare for the effective and efficient management of election and election related disputes.
3. The JWCEP in conjunction with stakeholders has worked tirelessly to ensure that the Judiciary is well prepared to deal with disputes arising from the elections.
4. The law previously provided that all petitions were to be heard by the High Court. In light of the anticipated number of election disputes, the JWCEP championed the amendments to the Elections Act to enable magistrates have jurisdiction to hear election petitions arising at the County level which were approved by Parliament. The Chief Justice will designate magistrates to adjudicate County Assembly election petitions
5. All Judges, Magistrates and key judicial staff have been trained on the laws, procedures, rules and management of election petitions. All judicial officers have been provided with a handbook on election laws and decided cases on elections.
6. The JWCEP has sensitised the public on election preparedness of the Judiciary through reports, lectures, talk shows, presentation of papers during conferences and engagement with stakeholders.
7. The Chief Justice has cancelled leave for judges and magistrates between March and October 2013 in order to focus the Judiciary on speedy, efficient and effective determination of election disputes.
8. The Judiciary has instituted an advanced Case Management System that will ensure that all election petitions filed in the High Court and Magistrates Court will be heard and determined within six months of filing and appeals therefrom determined within six months of lodging the appeal. The Supreme Court is required by the Constitution to hear and determine Presidential Election Petitions within 14 days.
9. The Judiciary has already set the pace for the efficient and effective electoral dispute resolution. Last year the High Court successfully determined 136 Constituency delimitation cases within a record
10. The Judiciary has developed both the Supreme Court (Presidential Election Petition) Rules and the Election (Parliamentary and County Assembly) Petition Rules. Consistent with the values of the Constitution, these rules have been developed with the participation of the public and stakeholders including the IEBC, the Law Society of Kenya and political parties.
11. The judiciary continues to collaborate with other stakeholders in election preparation measures and activities. The Chief Justice as the head of the National Council on the Administration of Justice (NCAJ) has been involved in providing leadership in this process and ensuring that all key State organs and institutions are aware of their responsibilities and are indeed prepared to deliver a free and fair election.
12. With the transparent recruitment of judges and the vetting process, the judiciary now has a pool
13. The Chief Justice will continue to issue practice directions where necessary to ensure that election disputes are dealt with expeditiously. Consideration is being given to extending court working hours including weekends.
14. The Judiciary is participating in the preparations for the swearing in of the President-elect and Deputy President-elect. The Chief Justice has appointed 47 judges and magistrates to officiate the swearing in of Governors and County Assembly members.
15. The Judiciary urges Kenyans to avoid committing election malpractices and other election offences and appeals to all Kenyans and to follow the due process of law instead of resorting to violence. Members of the public should feel free to lodge their complaints.

CAUTIONARY STATEMENT

Take note that this information is just a guide. The public should make reference to the relevant laws or seek legal advice.

You can read these rules at www.judiciary.go.ke

APPENDIX 4: CASE MANAGEMENT TIME-TABLE FOR ELECTION PETITIONS

Month/Activity	Apr	May	Jun	Jul
Petitions filed 28 days after	4 April, s. 39			
Security for costs	14 April, s. 78			
Service of petitions	19 April s. 76			
Responses		3 May, rule 14		
Pretrial Conference		10 May, rule 17		
Summary Dismissal, recount & interlocutory		10 – 31 May Interlocutori es; s.79	Recount disposing petition, rule 32	
Hearing			Daily	Hearing
Vote Scrutiny / hearing spillover				
Preparation of Judgment				
Delivery of Judgment				
Report on Election offences				

