



EACSOE Kenya Chapter 2017 General Elections Update

Supreme Court of Kenya (SCOK)'s Full Judgement on nullification of the Presidential Election

The awaited Supreme Court of Kenya (SCOK) delivered full judgement on the nullification of the Presidential elections on 20th September 2017. Majority judges highlights included: castigating IEBC for defying the order to open its system for scrutiny, saying this could have helped the commission debunk Nasa's claims that its servers were hacked; It held IEBC Chairman Wafula Chebukati responsible for failure to explain why presidential election results were not transmitted in the prescribed manner; Court said that IEBC has the responsibility to ensure that the system of voting, counting and tallying of results is verifiable and accurate; The SCOK was convinced that NASA proved that IEBC declared the presidential winner before receiving all 40,883 Forms 34As and thus used forms with dubious authenticity; The IEBC must put in place a complementary system for the repeat poll in compliance with Section 44A of the Elections Act and that in the repeat presidential poll, IEBC must put in place a complementary system for use when technology fails. The court, however, pointed out that it did not find any evidence incriminating the IEBC officials. The 2 dissenting judges read lengthy judgements explaining why the IEBC shortfalls were not sufficient to overturn the election.

Reactions by Parties

President's Statement on The Decision of The Supreme Court in Respect to the August 8 Election

The President issued a press statement stating that he still disagrees with the judgement but that he will respect the decision of the court. He also said that the government will do everything under the law to facilitate the IEBC to conduct another free, fair and credible election in accordance with the ruling of the Supreme Court He added that his Cabinet had already approved a Supplementary Budget that shall be forwarded to the National Assembly to fund fresh elections. Further, he stated that he had instructed all our security agencies to ensure that they remain firmly on the alert and focused on providing security to all Kenyans and their property.

The Independent Electoral and Boundaries Commission (IEBC)

Just a day before the full judgement, IEBC suspended its ICT officials (James Muhati - ICT Director, Paul Mugo - ICT Coordinator and Boniface Wamae - ICT Officer). The IEBC chairman indicated that the three failed to deliver their mandate in the August 8 General Election. In addition, just two days after the Supreme Court indicted IEBC for bungling the August 8 General Election, its Director of Legal and Corporate Affairs (Praxedes Tororey) opted to retire. These are among senior officials (including the ICT Director) that the NASA has been pushing to be removed. Further, and in response to the full judgement, the IEBC issued a new date (26th October, 2017) for the fresh elections to ensure the new poll conforms to the law and election regulations as ordered by the Supreme Court. The IEBC Chairperson also held discussions with a team of the African Judges and Jurists Forum (AJJF) on the Supreme Court's ruling and the implications of the repeat presidential polls. IEBC has also called for a joint meeting with NASA and Jubilee Party leadership next week to discuss key issue as preparations continue.

The Powers of the President during the temporary incumbency

NASA

NASA lawyers led by James Orengo on Wednesday stated that the Country might face a Constitutional crisis if the 60-day window lapses without fresh elections. He argued that President may not have any constitutional authority or legitimacy to be in office after the 60-days. He added that the law requires an acting President to be appointed until fresh election is held.

The Office of the Attorney General

In response to NASA's view, the Attorney General (Githu Muigai) while addressing the press at Sheria House on the subject stated that President Kenyatta would continue to enjoy all the powers bestowed on his office until the next head of state is sworn in. The powers, he said, include that of the Commander in Chief of the armed forces. He said the Constitution under Article 134(2) only restricts the President from carrying out some functions including but not limited to nomination or appointment of judges, appointment or dismissal of Cabinet secretaries or any other state or public officers and conferring the power of mercy or honours. He emphasized that the Article mentions the period between the election date and the day the newly elected president is sworn in.

Prosecution against IEBC Officials

NASA, has officially written to the Office of the Director of Public Prosecution demanding immediate criminal investigation against senior IEBC officials within 72 hours otherwise, they (NASA) will instituted private prosecution again pursuant to Section 28 of the Office of the Director of Public Prosecution Act. Among the Officials accused by NASA include the IEBC Chairperson, CEO, ICT Director, Director of Legal and Corporate Affairs among others.

The Director of Public Prosecutions Keriako Tobiko has instructed the Directorate of Criminal Investigations and the Ethics and Anti-Corruption Commission to investigate individuals who committed electoral offences in the recent elections. Mr Tobiko, in a statement on Saturday, asked the DCI boss Ndegwa Muhoro and EACC chief executive officer Halakhe Waqo to ensure that the joint investigations are completed within 21 days. Those in the soup include IEBC chief executive officer Ezra Chiloba and 11 other officials, NASA members Musalia Mudavadi and Siaya Senator James Orengo. Jubilee Party alleges that the two had access to information obtained illegally from the IEBC servers.

EACSOFF Kenya continues to monitor the situation and shall keep giving updates as the need arises.