



THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION'S
BRIEF TO THE JUSTICE AND LEGAL AFFAIRS COMMITTEE OF THE NATIONAL ASSEMBLY
ON THURSDAY 3RD MAY, 2018
AT CONTINENTAL HOUSE, PARLIAMENT

Hon Chairman and members of the Committee, thank you for this invitation before this House Committee to avail Clarifications on the two [2] issues addressed to the Commission by way of the letter dated and received on the 16th of April, 2018; and the subsequent invitation dated 25th April, 2018. We note the Committee requires the Commission to address the following two [2] issues:

- (i) The status of electoral legal reforms; and,
- (ii) The compulsory leave of the Commission Secretary/CEO

As a preliminary, allow us to once again apologise for any inconvenience occasioned by our request to reschedule the earlier invitation. We appreciate the indulgence extended to the Commission and we are glad to appear before the Committee today.

1.0 STATUS OF PROPOSALS FOR LEGAL REFORMS

1. The Commission commenced the process of post-election evaluation [PEE], which is being conducted at both County and National levels, culminating in a national conference. There will be stakeholder participation in the PEE process at both National and County fora. The recommendations of the PEE is intended to contribute to the review and reform of how the IEBC manages the Country's future elections, including proposing various amendments to the legal framework governing elections.
2. In the upcoming PEE launch and the National Conference thereafter, key stakeholders including the JLAC Committee will be invited to participate. The PEE National Conference is scheduled for early July, 2018. The PEE exercise is a key activity in the Commission's electoral cycle.

3. The Commission Plenary in its sitting of 16th March, 2018, adopted a resolution for the conduct of a comprehensive legal review, including the appointment of a team/taskforce to spearhead the review process. This is an ongoing activity, however preliminary findings of key areas that may require reform include:
- a. Amendment to the Elections Act, to introduce e-voting/i-voting to allow for a cost-effective and all inclusive voting for Kenyans in diaspora, in realization of the right to vote for all citizens under Article 38 of the Constitution;
 - b. Enactment of appropriate legislation to operationalize Article 255-257 of the Constitution, on the conduct of referenda;
 - c. Synchronization of the databases for Voter register, the civil registry as well as the register of births and deaths
 - We note the proposal in the Statute Law [Miscellaneous Amendment] Bill, 2018 with regard to the amendment of Registration of Persons Act, CAP 107 and the proposed establishment of the National Integrated Identity Management System.
 - d. Standardization of scrutiny processes, pursuant to court orders. This is informed by the haphazard manner with which scrutiny processes were conducted as ordered by the various courts in the recently concluded election petitions;
 - e. The staggering of the elections for national and county elections to enhance efficiency and reduce pressure on the election systems and personnel;
 - f. Alignment of legal timelines to avoid overlaps and allow sufficient time for each exercise including:
 - (i) Political party primary timelines; and,
 - (ii) Dispute resolution timelines.
 - g. Synchronization of political party nominations and independent candidates nominations;
 - h. Review party list nomination regulations to provide clarity and enhance transparency of the process;

- i. Prohibition of any amendments to the Election laws, one year to a general election in line with international best practice;
- j. Enactment of timelines within which pre-election disputes, including procurement related suits, must be determined to avoid disputes dragging too close to the elections, which could interfere with proper conduct of elections;
- k. Enactment of legal framework for replacement of a deputy governor, should a vacancy occur in that office before a regularly scheduled election;
 - We note the Bill currently pending before the Senate, and the Supreme Court Advisory Opinion No 1 of 2015 in the matter of the Speaker of the County Assembly of Embu, on this issue.
- l. Clarity on implementation of Chapter 6, Constitution in relation to clearance of candidates to contest in an elective position;
- m. Enactment of amendments to review the Structure, roles and operation of the Commission, for enhanced synergy: bearing in mind the existence of full time Commissioners and a Secretariat, whose roles need to be harmonized; and,
- n. Stagger the appointment of Commissioners to ensure continuity, institutional memory and succession at the Commission.

2.0 COMPULSORY LEAVE OF THE COMMISSION SECRETARY/CEO

Hon Chairman and members of the Committee, we draw your attention to the fact that this matter is currently the subject of a Petition No 29 of 2018, in the Employment and Labour Relations Court here in Nairobi. Mindful of the *sub Judice* rule, we wish to provide a background to the decision to send the Commission Secretary/CEO on compulsory leave and state as follows:

- (1) We have presided over the most expensive election in Kenya's history. Our estimates indicate that we spent approximately KES 46 Billion [KES 34 Billion for GE and KES 12 Billion for FPE]. This figure excludes annual operational expenditures and funding support from development partners. Understanding the expenditure of the 2017 elections will help in laying strategies to reduce cost of future elections.

- (2) When we assumed office on 20th January 2017 we were faced with a pending bill of about KES 1 Billion, arising from the 2013 General elections.
- (3) Early this year the Commissioners sought an update on the status of payment to our suppliers and service providers for the 2017 elections. To our surprise a number of suppliers and service providers had not been paid due to inadequate procurement documentation to support payment. This is an indication that proper procurement processes might not have been adhered to although those goods and services were utilized during the 2017 elections. This could potentially lead to huge pending bills, which would ultimately unduly expose the Commission to audit queries and possible subsequent litigation by suppliers and service providers.
- (4) Consequently, the Commission Plenary in its meeting held on the 16th of January, 2018 resolved to have the Commission Chairman formally write to the Accounting Officer/CEO for an explanation on the concerns raised. This was done by way of a Memo issued on 16th January, 2018. The CEO/CS on his part responded by way of a Memo dated 19th February, 2018.
- (5) Subsequently, the Commission's Plenary meeting of 16th March, 2018 considered the Accounting Officer's response and found the explanation inadequate. Consequently, the Plenary resolved to refer the matter to the Commission's Directorate of Internal Audit for a preliminary audit and submit a report within (14) days.
- (6) The Commission's Directorate of Internal Audit submitted a report dated 5th April, 2018; and the same was tabled in a properly constituted Plenary meeting held on 6th April, 2018. The Commissioners in the meeting freely deliberated on the findings of the said report, and consequently made two resolutions:
- a. To conduct an in-depth audit with an expanded scope to include all major procurements for the GE and FPE, and to provide for adequate time for the exercise [upto three months]. This resolution was unanimously adopted; and,
 - b. The CEO to go on a three month compulsory leave to enable the in-depth audit be conducted. This resolution was adopted through a majority vote [3 in favor and 2 against].

- (7) The Plenary asked the Commission Chair to write a compulsory leave letter to the CEO immediately as per the Plenary resolution. Upon receipt of the same, the CEO moved to Court to challenge the decision to send him on compulsory leave, the Case is due for Hearing on the 7th of May, 2018.
- (8) The Commission's Internal Auditor has since commenced the in-depth audit as per the Plenary Resolution communicated via a Memo dated 13th April, 2018.
- (9) To our surprise on Monday 16th April, 2018, we learnt of the reported resignation of our colleagues through the media. We are left to wonder why our colleagues, including the Chairman of the Commission's Committee on Finance and Procurement would resign simply because an accounting officer had been asked to pave way for an in-depth accounting audit.
- (10) It is not the first time the Commission's Plenary adopted a resolution by way of voting. Out of the 61 Plenary meetings held to date, the Commission has on 8 occasions adopted resolutions by way of a vote, which resolution have nonetheless remained Plenary resolutions. In our view, it is dishonest and against good corporate governance practice that a member who losses a motion, would purport to resign because a decision did not go their way. It appears there could be other motives for the said resignations, which are not clear to us.
- (11) Moreover, the Commission previously sent various officers on compulsory leave to facilitate internal audits into various issues as may have arisen from time to time. Such Plenary decisions were communicated by the Commission Secretary/CEO to the concerned staff. It is therefore ironical, that the CEO could find it unacceptable to proceed on leave, and has since refused to hand-over to date.
- (12) The main reason[s] cited by our colleagues [Commissioners] for their purported resignation is lack of adequate leadership on the part of the Chairman. For the record, the Chairman chaired 61 Plenary meetings [including special meetings] and save for eight occasions, all resolutions were adopted by way of consensus, which clearly indicate the Chairman's able leadership. Divergence of opinion in Plenary meetings cannot be construed to mean poor leadership or disunity among Commissioners. On the contrary it is an indication of vibrant Plenary meetings. It is therefore dishonest to portray the Chair as a weak leader just because one decision did not go their way.

- (13) Indeed outside plenary meetings, the Chair presided over other Commission activities, especially being the only lawyer amongst Commissioners. For example the Chair successfully presided over, 350 dispute resolution committee cases, 71 code of conduct enforcement Hearings and 23 party list dispute hearings inter alia.
- (14) Some of the highlights of the achievements of the Commission under the leadership of this Chairman include:
- a. Successfully holding the 2017 elections [GE and FPE];
 - b. Improved efficiency at the Commission through adoption of a devolved structure with the establishment of 47 county election management offices – from the previous 17 regional offices;
 - c. Successful deployment and use of integrated electoral technology;
 - d. Successful enforcement of electoral code of conduct which enhanced campaign discipline;
 - e. Proactive stakeholder engagement and pursuit of public confidence in the electoral processes;
 - f. Development/review of appropriate policies and strategies to facilitate realization of the Commission's mandate; and,
 - g. Effectively overseeing the Secretariat in realization of the Commission's mandate.
- (15) On the issue of the Constitution of the Commission, we draw the Committee's attention to Section 7(3), IEBC Act, which is unequivocal that notwithstanding a vacancy in the membership of the Commission, the Commission remains properly constituted. Further Section 5(4), IEBC Act as read with the First schedule to the IEBC Act provides for the procedure for filling of vacancies in the Commission's membership, should they arise.
- (16) In discharging the functions set out under Article 88, Constitution and Section 4, IEBC Act the law under Section 7(3), IEBC Act recognises that the Commission shall be properly constituted notwithstanding possible vacancy/vacancies in the membership thereto.
- (17) As such the question on the appropriacy or lack thereof of the constitution of the Commission, is an unequivocally settled issue in law and the Commission in its current form, remains properly constituted notwithstanding any vacancy/vacancies that may have arisen in its membership – as a result of the reported resignations

(18) The Commission being lawfully and properly constituted, we note that there is no limitation anticipated by the law on the discharge of the functions of the Commission vis-à-vis its current membership.

- a. First, Article 88(5), Constitution, S. 8, IEBC Act and Para 11 of the Second Schedule to the IEBC Act allows the Commission discretion in conducting its business and affairs subject to as provided for under the Second Schedule to the IEBC Act. The Quorum considerations in the Second Schedule significantly at Para 5 only come into play when plenary needs to sit.
- b. Secondly, Section 11, IEBC Act establishes the Commission's Secretariat, to facilitate the realisation of the Commission's mandate. Section. 11A, IEBC Act additionally provides for an intricate-conjoined but contemporaneously distinct relationship between the Commission and Secretariat, in ensuring that the Commission realises its mandate. The Commission has, under Section 12, IEBC Act created functional Units including Committees, directorates, departments and field offices which assist the Commission discharge its functions.

(19) It is our considered view that the Commission's operations are not hampered by the reported resignation of the three Commissioners, as various programmes and activities have been approved for implementation however oversight and creation of new policy directions may be deferred awaiting the restoration of a quorate Commission. As such it is necessary for the relevant Authorities to institute the appropriate processes to fill the vacant positions in the Commission's membership in accordance with the IEBC Act.

3.0 CONCLUSION

As repeatedly observed, upon assuming office my fellow Commissioners and I agreed to have two priority actions:

- i. Deliver free, fair and credible 2017 General elections – which we did under very difficult circumstances; and,
- ii. Focus on transformation of the Independent Electoral and Boundaries Commission [IEBC] as regards our structure, systems, processes and staff to make the Commission a transparent and credible electoral management body [EMB].

We are committed to a continued discharge of our mandate including effective oversight, as we await filing of the vacancies in the Commission's membership arising from the reported resignations.

The Commission has men and women dedicated to serving this Country. We urge for this Committee's support for the accountability and other reform measures instituted at the Commission; and with the support from the August Houses and the Kenyan people, the mission to transform the management of elections in Kenya is attainable. The conversation has to be bigger than replacement of the Chairman, Commissioners or even the Secretariat. Indeed the conversation should center on objective transformation of the institution [IEBC].



WANYONYI W. CHEBUKATI
CHAIRMAN-IEBC