



Update: Post-Electoral Challenges in Kenya

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1. Introduction

The people of Kenya went to the polls on 27 December 2007 to elect the country's new President as well as a new Parliament. The pre-election situation had been perceived by most observers and commentators as having been calm, and the general mood of stability had convinced international observers such as the European Union (EU) that an observer mission was not necessary.¹ However, challenges emerged immediately prior to the announcement of the results as allegations of voting tallying irregularities in the presidential polls began to spread. When the results were in fact announced on 30 December, Kenya was drowned into post-electoral violence that has crippled the country. Subsequently various resolution efforts, such as the one currently led by the former United Nations (UN) Secretary-General, Kofi Annan, have been expended to try and quell the fires and find a political solution to the current challenges. This short paper provides an overview of Kenya's post-electoral challenges and outlines the positions of the parties to this disputes as well as attempts to find a solution.

2. Background

Kenya has been holding presidential, parliamentary and local government elections on the same day since independence from Britain in 1963. The 10th elections were held on the 27 December 2007. These elections were the fourth multi-party elections since the country reverted to multi-party democracy in 1991. The country uses winner takes all, first-past-the-post electoral system and all candidates are voted directly using universal suffrage. This makes elections in Kenya ruthlessly competitive.

In the 27 December elections, nine (9) candidates vied for the post of President. Of these, however, ~~only three were serious candidates. These were the incumbent president Mwai Kibaki, and Messrs Raila Odinga and Kalonzo Musyoka.~~ The election also saw a record number of 2 548 candidates (compared to 1 033 during the 2002 parliamentary elections) contesting the 210 available Parliamentary seats in the country's different constituencies. In terms of political parties, the election was contested by twenty-three (23) political parties among them Mr. Odinga's Orange Democratic Movement (ODM), Mr. Musyoka's Orange Democratic Movement-Kenya (ODM-K), Mr. Kibaki's Party of National Unity (PNU) and the former ruling party, the Kenya African Union (KANU) led by Mr. Uhuru Kenyatta. The latter supported Mr. Kibaki and therefore did not field a presidential candidate.

Unlike the disputed results of the Presidential polls, the Parliamentary polls were regarded as having been free and fair and they brought a number of interesting changes in the country's Parliament such as:

¹ See for instance, Kenya's Elections: Twilight Robbery, Daylight Murder, The Economist Online Edition, January 3, 2008. Sourced from: www.economist.com/world/africa/Printerfriendly.cfm?story_id=10438473. on 2008/23/01



- Of the 190 immediate former Members of Parliament (MPs) defending their seats only 71 were re-elected;
- Out of 35 cabinet ministers, twenty four ministers including the vice-president were defeated;
- KANU, the official opposition party after the 2002 elections was reduced from 62 to 14 seats; and
- Fifteen female candidates (there were only 9 in 2002) were elected which is the highest number in Kenyan history.²

The ODM emerged the winner in parliamentary vote with 99 seats followed by PNU with 43 seats and the third position went to ODM-K with 16 seats and KANU received 14 seats.³ ODM's friendly parties such as NARC won three seats thus giving the party a lead of 102 seats. As for PNU, it has a number of affiliates such as KANU, *Sisi Kwa Sisi*, Safina, NARC-Kenya and others which increased its seats to 78 in total.⁴ According to the Kenyan laws, Parliament comprises of 222 MPs of which 210 are elected and 12 are nominated by parties according to the number of their elected MPs. Thus, Mr. Odinga's ODM increased its parliamentary majority as it nominated six MPs, whilst Mr. Kibaki's PNU nominated three, and Mr. Musyoka's ODM-K two.

3. Presidential Election-Result Debacle

The current post-election challenges began on Saturday 29 December following delays in release of presidential results from the central region, where Mr. Kibaki enjoyed support. At that time, Mr. Odinga was leading in the presidential tally by more than half a million votes. On the afternoon of 30 December, after more than 12 hours delay, the paramilitary sealed off the city centre and swarmed around the vote-tallying hall. Meanwhile, the ministry of internal security imposed a ban on live media broadcasts and public assembly. The paramilitary then huddled the Electoral Commission chairman, Mr. Samuel Kivuitu, and two other commissioners in a tiny room and exclusively through state-funded Kenya Broadcasting Corporation (KBC), Mr. Kivuitu announced Mr. Kibaki re-elected with 4 584 271 against Mr. Odinga's 4 352 993.⁵ In less than an hour, Mr. Kibaki was sworn in at State House in a ~~low key function attended by only a few close friends and civil servants and in which the national anthem was not played.~~⁶ In contrast to Mr Kibaki's first term, when the inauguration took place in a public park heaving with jubilant supporters, there were no dignitaries or diplomats, and this was seen as an anomaly in terms of how Kenya conducted such ceremonies in the past.

² Kenyan Parliamentary Elections, 2007, Wikipedia Online Encyclopaedia, sourced from: http://en.wikipedia.org/wiki/Kenyan_parliamentary_elections_2007 . on 2008/28/01

³ Kenyan Parliamentary Elections, 2007, Wikipedia Online Encyclopaedia, sourced from: http://en.wikipedia.org/wiki/Kenyan_parliamentary_elections_2007 . on 2008/28/01

⁴ Kenyan Parliamentary Elections, 2007, Wikipedia Online Encyclopaedia, sourced from: http://en.wikipedia.org/wiki/Kenyan_parliamentary_elections_2007 . on 2008/28/01

⁵ Ongiri, I, 2007, I Acted Under Pressure, Says Kivuitu, East African Standard, 2 January; Bosire, B. 2007, Defeated Kenyan Challenger Cries Foul, Pan African News. Sourced from: <http://panafricannews.blogspot.com/2007/12/Kenya-election-update-violence-reupts>. 2008/25/01

⁶ Kipkorir B. D., Daily Nation, 5 January 2008



Mr. Odinga's ODM immediately declared its objection to the results arguing that the elections had been rigged. Although Mr Odinga impressed upon the ODM supporters and Kenyans in general to remain calm following the announcement, all indications were that Kenya would be faced with a looming crisis. A picture of what the immediate future would hold for Kenya was made clear when soon after President Kibaki was sworn in, Odinga stated that: *"I cannot and would not accept a Kibaki win; the results are there, if I had lost I would have accepted, this is a fait accompli"*.⁷ For his part, Mr. Kibaki urged Kenyans to accept the outcome when he stated that: *"I urge all of us to set aside the passions that were excited by the election process, and work together as one people with the single purpose of building a strong, united, prosperous and equitable country"*.⁸

The main bone of contention, and indeed as alleged by the opposition is that the elections were rigged during the final tallying of the vote. For example, though the elections for president, MPs and councillors took simultaneously, results from the central region which were delayed showed that a big number of voters only cast their votes for the Presidential elections and not for the Parliamentary elections, while in one constituency called Maragwa votes cast for the president was 115% of the registered voters.⁹ In other instances, in Nairobi Province, the results announced at the constituency halls were simply "crossed out" and replaced with bigger numbers at the national tallying hall in the city centre in order to tilt the scales in favour of Mr. Kibaki.¹⁰

In the processes of these allegations, the role, neutrality and competency of the ECK was placed in doubt especially following the statements made by its Chairperson, Mr Kivuitu. On 2 January several newspapers quoted Mr. Kivuitu saying that he announced the results under pressure. The East African Standard opined that the magnitude of the ECK Chairperson's admission and the dent on the credibility of the election was captured in his answer when asked if indeed President Kibaki had won the elections: *"I do not know whether Kibaki won the election"*.¹¹ Further, Mr. Kivuitu was reported to have said that he took the Presidential election winner's certificate to State House after *"some people threatened to collect it while I'm the one mandated by law to do so...I arrived at State House to take the certificate and I found the Chief Justice there, ready to swear-in Kibaki"*.¹² Such a statement from the Chairperson of the ECK fuelled the already heightened tension and strengthened the existing view that the counting of the presidential votes was not credible, thus strengthening the call by the ODM that Mr. Kibaki was not the winner. The tension between the parties was increased further when Mr. Kibaki announced his new partial Cabinet on the 8 January.¹³ The partial Cabinet included the ODM-

⁷ Mugonyi, D. 2007. Raila Also Declared 'President', Pan African News. Sourced from: <http://panafricannews.blogspot.com/2007/12/Kenya-election-update-violence-reupts>. 2008/25/01

⁸ Mugonyi, D. 2007. Raila Also Declared 'President', Pan African News. Sourced from: <http://panafricannews.blogspot.com/2007/12/Kenya-election-update-violence-reupts>. 2008/25/01

⁹ Kenya's Elections: Twilight Robbery, Daylight Murder, The Economist Online Edition, January 3, 2008. Sourced from: www.economist.com/world/africa/Printerfriendly.cfm?story_id=10438473. on 2008/23/01

¹⁰ Kenya's Elections: Twilight Robbery, Daylight Murder, The Economist Online Edition, January 3, 2008. Sourced from: www.economist.com/world/africa/Printerfriendly.cfm?story_id=10438473. on 2008/23/01

¹¹ Ongiri, I, 2007, I Acted Under Pressure, Says Kivuitu, East African Standard, January 2

¹² Ongiri, I, 2007, I Acted Under Pressure, Says Kivuitu, East African Standard, January 2

¹³ Mushtaq, N. 2007, Kibaki Spoils Reconciliation Bid, Inter-Press Services (IPS), January 8



K leader, Mr Musyoka, as Vice-President, a move that may further drive the two main parties apart.¹⁴ Mr. Musyoka's ODM-K broke from the mainstream ODM led by Mr. Odinga in mid-2007 and he emerged a distant third in the presidential race with 800 000 votes.

The ECK Chairperson's revelations could be interpreted to be in contradiction with a number of African Union (AU) instruments regarding good governance, democracy and elections. For instance, the African Charter on Democracy, Elections and Governance (adopted by the AU in January 2007) among other things, states that AU Member States must "establish and strengthen independent and impartial national electoral bodies responsible for the management of elections".¹⁵ Therefore, the ECK chairperson's statements suggest that the impartiality of the Commission was undermined, which goes against the spirit of the Charter. In fact, Kenya's post-electoral woes have presented the AU with challenges that may have in fact not been envisioned when it was founded. In the first instance, the Constitutive Act of the AU, Article 4(p) empowers the continental body to speak out and reject any unconstitutional changes of Government.¹⁶ In the same vein, Article IV (13) of the AU Declaration on the Principles Governing Democratic Elections in Africa states that: "every individual and political party participating in elections shall recognise the authority of the Electoral Commission or any statutory body empowered to oversee the electoral process and accordingly render full co-operation to such a Commission/Body in order to facilitate their duties".¹⁷ It is likely therefore, that as the electoral process in Kenya was about to be concluded, the 'authority' of the ECK was undermined if its Chairperson was cajoled to announce the results that may have not been a true reflection of the general will of the peoples of Kenya.

However, the case of Kenya may present a challenge in the sense that, what occurred in that country may not fall within the issues that article 4 of the Constitutive Act may define as 'unconstitutional changes of Government'. Indeed, the renowned Kenyan Scholar Ali A. Mazrui recognised this challenge in his comments: *The African Union has tried to deny legitimacy to a government produced by a military coup. Is there such a thing as a civilian coup? If the Kenyan presidency was stolen, should Kenya lose its seat at the meetings of the African Union until the problem is resolved?*¹⁸ It is perhaps this realisation that prompted the 109th meeting of the Peace and Security Council (PSC) of the AU held on 21 January 2008 to issue a statement that: "Council stressed the need to initiate a collective reflection in the challenges linked to the tension and disputes that often characterise electoral processes in Africa, including strengthening of the African capacity at national, regional and continental levels to observe and monitor elections".¹⁹

¹⁴ Mushtaq, N. Kibaki Spoils Reconciliation Bid

¹⁵ African Charter on Democracy, Elections and Governance, 2007, African Union Documents.

¹⁶ Constitutive Act of the African Union, 2000.

¹⁷ AU Declaration on the Principles Governing Democratic Elections in Africa-AHG/Decl. 1 (XXXVIII) 2002

¹⁸ Mazrui, A. Post-Election Kenya: Should It Be Suspended from the Commonwealth? Sourced from <http://pabazuka.org/en/category/comment/45739>. On 2008/06/02

¹⁹ Press Statement, Peace and Security Council, African Union, 21 January 2008.



4. The Aftermath: Violence and Human Rights Violations

Aftermaths of the disputed Presidential election results include violence, which erupted in different parts of the country. At the time of compiling this paper, more than 1000 people had died, more than 300 000 were displaced and property and infrastructure worth billions of US dollars was destroyed. The Kenya Association of Manufacturers estimates that the gross domestic production has fallen by 260 billion Kenya shillings (US\$3.5 billion) and more than 400,000 have lost their jobs. Indeed, the full impact of the humanitarian and economic costs is yet to be fully comprehended.²⁰

Over and above the destruction that has occurred, the violence has acquired ethnic overtones which led many media reports to brand it rather simplistically an "an ethnic conflict". This reading of a rather more complex issue with other deeper nuances was a result of the fact that generally when the violence erupted at community levels in different parts of Kenya, as members of the Kikuyu community were initially targeted. Mr. Kibaki belongs to the Kikuyu community whose elite has dominated Kenya's economic realms since independence in 1963.²¹ The later phases of the violence saw retaliatory attacks by the Kikuyu against other communities. However, a reflection upon Kenya's politics shows that the post-electoral woes reveal many profound issues inherent in Kenya's polity. Indeed, a report by the state-funded Kenya National Human Rights Commission says that "since 1992, Kenya's elections have been progressively better and fairer, culminating in the 2002 elections which were the best ever, and the 2005 constitutional referendum. The effect of this progression is that Kenyans finally believed in the power of the vote as a way of peacefully resolving differences, a fact confirmed by voting trends in the recent parliamentary elections that saw almost 70 percent of incumbents lose their seats. When this sense of empowerment was subverted, and peaceful legal spaces for protests were disallowed, it is then that frustrations boiled over and violence ensued."

Historical injustice and access to and use of resources such as land are some of the issues that have contributed to the violence arising after the disputed presidential poll, and Kenyans had hoped their empowered vote would address these issues after previous governments failed to do so.²² For example, in the Rift Valley Province where the post-electoral violence was more pronounced, access to land has always been a thorny issue going back to colonial periods. Even in the post-independence era, Government land reform strategies were designed in such a manner that they favoured the Kikuyu in the Rift Valley as compared to other groups such as the Kalenjin and Masaai.²³

Another aftermath of the violence has been the economic effects on the East African region. Uganda, Rwanda and Burundi which depend on Kenya's port at Mombasa and on manufactured goods from the country immediately felt the impact as the violence disrupted the road networks and supply lines from Mombasa to Busia at the Uganda border point. In the three countries, the price of oil skyrocketed, thus forcing the rationing of this commodity and an increase in the prices of basic

²⁰ Njugunda, 2008, Ralia Rules Out Becoming Kibaki's PM, Kenya Today. Sourced from: <http://politics.nationmedia.com>. On 2008/01/28

²¹ Kenya Election Update: Violence Erupts After Kibaki Declared Winner, Pan African News Wire, 31 December 2007. Sourced from: www.panafricannews.blogspot.com. On 2008/01/28

²² IRIN, Kenya: The Rift valley's Deadly Land Rows, sourced from: www.irinnews.org/PrintReport.aspx?reportid=76319. on 2008/01/28

²³ Ibid;



commodities and foodstuffs. Ugandans suffered further as vehicles and long-distance trucks bearing the country's registration numbers were attacked following President Museveni's recognition of Mr. Kibaki as the re-elected president of Kenya.

Further, the situation in Kenya has arguably spiralled to what it is today partly due to the reaction of the international community to the announcement of the election results. The European Union (EU) observer delegation and the Pan-African Parliament (PAP) delegation aired their objections to the results. The EU statement, stated among other things, that the elections were *"marred by a lack of transparency in the processing and tallying of the presidential results, which raises concerns about the accuracy of the final results"*²⁴ while the PAP mission observed that while the actual election was characterised by very high voter turn out, calm and orderliness, there were serious challenges with the announcing of the results. The PAP further observed that, *"the premature announcement of the supposedly final presidential election results...at a remote and secured place was clearly stage-managed. It is the Mission's considered view that the disputed election fell short of matching the democratic election process and the expression of the will of the people of Kenya."*²⁵

5. Resolving the Stalemate

In the wake of post-electoral woes, several efforts have been made to try and resolve the stalemate. These have seen different key individuals, such as erstwhile Chairperson of the AU and President of Ghana, John Kufuor, the USA Under-Secretary of State for Africa Jendai Fraser, former Archbishop of the Anglican Church in South Africa, Bishop Desmond Tutu, going into Kenya to generally appraise the situation and engage with the parties involved.

Currently, the main initiative to resolve the stalemate is under the aegis of the AU with support from the UN and it is led by the former Secretary-General of the UN, Mr Kofi Annan. It was through the initiative of Mr Kofi Annan that the two key leaders, Mr Odinga and Mr. Kibaki were able to hold face-to-face talks on 30 January 2008 where they both pledged to find a solution to the crisis that has engulfed Kenya.²⁶ The efforts by Mr Annan, have also included being able to convince the two parties ~~to form teams of negotiators and liaison officers who are taking part in a dialogue aimed at finding a solution.~~ Thus, the process to find a political solution through dialogue is still on-going.

In some areas progress was achieved since Mr Annan managed to bring the parties to a face-to-face meeting, this include among others agreements on ending the violence and the delivery of humanitarian assistance to affected communities and victims of recent spate of violence. There has also been an agreement on the creation of a Truth and Reconciliation Commission, the involvement of the UN High Commissioner for Human Rights to investigate the post-election violence.

²⁴ EU Casts Doubt Over Kenyan Poll, BBC News. Sourced from: <http://news.bbc.co.uk/1/hi/africa/6800000.stm>. On 2008/20/06

²⁵ Statement of the Pan-African Parliament Election Observation Mission to Kenya's General Election held on the 27th December, 2007, issued on: January 23 2007.

²⁶ Agina, B & Limo L. 2008. Kibaki and Raila Negotiations, All Africa News, sourced from Factiva



However, on the core issues surrounding the disputed election results the parties' positions are still far apart. For instance, as recent as 6 February 2007, it was reported that the Government is adamant that the matter of a disputed election result should be taken to the court, while the ODM has called for an arrangement where the two sides would share power in an interim period in order to prepare for fresh Presidential elections.²⁷ It has also come out that while the Government has advanced legal arguments to oppose a recounting and re-tallying of votes cast, the ODM has questioned the independence of the judiciary and the integrity of the ECK. Some of the legal arguments advanced by the Government delegation to the negotiation include²⁸:

- They reject re-counting of Presidential votes on the grounds that such an exercise can only be conducted if the aggrieved party demands it at a polling station or through a court order in the case of a petition, but the ODM did not pursue this option;
- They have argued that re-tallying was not legally possible because it is only permissible if the aggrieved candidate petitions the ECK within twenty-four hours of the tallying and the Commission responds within forty-eight hours on receiving the petition. Again, the Government negotiating team argues that ODM did not pursue this avenue;
- They also reject the proposal for a Judicial Commission of enquiry into the Presidential elections because this option had not been advanced by ODM through a petition and moreover, such an option (a Judicial Commission) cannot be undertaken due to ODM's declared lack of confidence in the country's judiciary;
- They also argue that a Presidential re-run was not legally possible since none of the candidates in question, namely, President Kibaki and Odinga, failed to score 25% of the votes in five provinces; and
- They have also ruled out the possibility of a forensic audit of the pre and post election environment on the grounds that there is already a case filed by a Kenyan citizen which is before the High Court and therefore discussing such a matter will be *sub judice*.

The above highlights the rejection of some of the proposals made by the ODM's negotiating team. In essence, the ODM has called for:

- Formation of a Transitional Government which will share executive power with the PNU and made up of Ministers from the two major parties based on their parliamentary strength. Such a Government will be in power for three-six months during which it will implement reforms in preparations for new elections;

²⁷ Namunane B & Baras L. 2008. Sharp Divisions Over Disputed Results. Kenya Elections 2007. Sourced from: www.politics.nationmedia.com/inner.asp?pcat=news&cat=TOP&sid=1434&prnt=1. on 2008/02/07

²⁸ These were sourced from various media reports, see in particular, Namunane B & Baras L. 2008. Sharp Divisions Over Disputed Results. Kenya Elections 2007. Sourced from: www.politics.nationmedia.com/inner.asp?pcat=news&cat=TOP&sid=1434&prnt=1. on 2008/02/07



- The proposed reforms include: re-constitute the ECK, improve the voters register; and enact new constitutional reforms to enable the Transitional Government to function for a stipulated period of time;

The talks between the parties are still continuing despite the clearly divergent views on how to deal with the problems. The facilitation team led by Mr Kofi Annan has impressed upon the leadership of both parties to look beyond their party political differences and seek solutions that would be of greater benefits to the people of Kenya. It is interesting to note, that the Kofi Annan Facilitation Team had requested assistance from Mr Cyril Ramaphosa who was however rejected by Mr. Kibaki's group on the basis that he cannot be an honest broker, (since it is alleged that his company has business dealings with Odinga).²⁹ The South Africa Ministry of Foreign Affairs has since released a statement in which it criticised the decision by the Kenyan Government to reject Mr Ramaphosa's involvement in mediation efforts.³⁰

6. Conclusion

The post-election challenges in Kenya erupted at the time that the continent has been pushing for consolidation and entrenching the rule of law, respect for democratic principles and human rights on the continent. While Kenya may not be an exception to other electoral related challenges in Africa, the on-going failure to find a solution presents an opportunity for the continental body and regional mechanisms to indeed reflect upon the usefulness of existing AU instruments around the question of democratic elections. On the other hand, the spate of violence among the people of Kenya, which have been perceived within a prism of 'ethnic differences, is a further reminder that the responsibility of governing any country demands among other things, a fair and equitable distribution of public resources.

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