



# How to Ensure a Credible, Peaceful Presidential Vote in Kenya

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## I. Overview

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Kenya must hold repeat presidential elections before 1 November, after the country's Supreme Court annulled a first vote that took place in early August. The Court's decision was historic, unprecedented in Africa's electoral history and applauded across the continent and beyond. It has, however, provoked a response from Kenyan political leaders that has introduced new levels of tension and uncertainty ahead of the fresh vote. Both camps – President Uhuru Kenyatta's ruling Jubilee Party and his rival Raila Odinga's National Super Alliance (NASA) – have adopted inflexible positions; both mobilise supporters in the streets. An opposition boycott of the forthcoming vote or failure to hold it before the deadline could provoke a political or constitutional crisis. Graver still are risks of escalating clashes between protesters and security forces.

The immediate challenge is to find a formula, centred on electoral reforms, that persuades Odinga's camp to participate, is acceptable to President Kenyatta and Jubilee, and does not involve changes to the Independent Electoral and Boundaries Commission (IEBC) so extensive that it is hamstrung and unable to administer the polls in time. One way to break the logjam might be for both parties to embed representatives in the IEBC to observe election preparations. This, together with significant changes to electoral procedures – some of which the IEBC already has proposed, others of which should follow – could increase confidence in the vote. Kenya's international partners, who retain a degree of leverage and good-will with players on both sides of the divide, could help mediate such an agreement.

Even if the parties find a path to elections, the threat of violence afterwards, whatever the outcome, is high. A firmer stand by Kenyan leaders against hate speech and pledges to campaign peacefully and take any complaints back to the courts after the vote would go some way to lower the temperature. Security forces should prepare to manage protests impartially; holding to account officials that overstepped in August would send a positive signal. International observers should also adapt their approach based on their experiences during the first vote, potentially reviewing the timing of their post-election assessments. With its decision, the Supreme Court made a bold statement about judicial independence and the need for improved and more

transparent election administration; Kenyan leaders now need to move away from harsh words and towards compromise.

## **II. Deepening Fault Lines**

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In its detailed judgment released on 20 September, the Supreme Court's majority criticised the Independent Electoral and Boundaries Commission (IEBC) for its conduct of the vote. In essence, they found no evidence of flaws in polling and counting but such widespread "irregularities and illegalities" in results tabulation and transmission as to render the process a violation of election regulations and the constitution. They cited in particular the announcement of final results before the IEBC chairman had received scanned returns forms from over 10,000 polling stations and the IEBC's refusal to open its server to scrutiny and allow the court to investigate further.<sup>1</sup>

Fault lines have deepened since the court's decision. Opposition candidate Raila Odinga feels vindicated by a judgment that largely upheld his petition against the IEBC's handling of results (official tallies showed his rival, President Uhuru Kenyatta, winning by 54 to 46 per cent). Odinga's NASA party has presented a set of demands ahead of the new vote.

These include the replacement of several senior IEBC officials, notably its chief executive officer, Ezra Chiloba, more transparency in the electoral body's IT systems and new returning officers – officials responsible for constituency tallying centres. NASA threatens to not only boycott the fresh vote but to prevent it from taking place at all if these demands are not met. "You cannot make a mistake twice and expect to get different results", Odinga told reporters on 5 September.<sup>2</sup> On 26 September, his supporters began a round of what they promised would be weekly street protests until Chiloba quits.

President Kenyatta, seeking a second and final term, initially adopted a measured response to the judgment, saying he disagreed with it but would respect it. Since then, however, his rhetoric has hardened. He portrays the justices as having subverted the people's will, has labelled them "crooks" and has signalled his intention to clip their wings, a dangerous escalation against the judicial branch.

On 14 September, a parliamentarian from Kenyatta's ruling Jubilee Party filed a petition to remove Chief Justice David Maraga from office, only to withdraw it two days later in the face of public backlash. Ruling party supporters also have taken to the streets; on 19 September, they burned tires and blocked the Supreme Court's entryway. Those actions, Maraga said, were designed to "intimidate the judiciary". Kenyatta and his Jubilee Party reject NASA's demands for reforms ahead of the forthcoming vote; Deputy President William Ruto, cites them as proof Odinga has no intention of participating. On 28 September, a group of Jubilee MPs sought to impose their own reforms, proposing legal amendments that would institute significant changes, including dropping the electronic transmission of votes as the primary mode of relaying results.

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<sup>1</sup> Olive Burrows, "Blame for nullified poll lies squarely on IEBC: Supreme Court", Capital News, 20 September 2017.

<sup>2</sup> "Kenya's Odinga rejects election re-run date without 'guarantees'", VOA News, 5 September 2017.

The IEBC has set the election date for 26 October. But considerable distance remains between the two camps over how the balloting will be conducted. An opposition boycott could lead to a lasting political stalemate. Failure to hold a vote before 1 November could provoke a constitutional crisis, given that Kenya's 2010 constitution is silent on what would happen in such an eventuality. With memories of past election-related violence still raw, there is a real risk of further clashes between opposition supporters and security forces, with grave potential to escalate.

### **III. A Workable Compromise**

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The immediate priority is to find a formula that is both acceptable to both sides and workable for the IEBC. This will be no mean feat, given that both political parties appear to have settled into intransigent positions and the IEBC itself is now beset by infighting, with memos between the chairman and chief executive officer seeking to assign blame being leaked to the media.<sup>3</sup>

In principle, the court's decision should give all sides room to compromise. For Kenyatta, though the decision absolved him personally of any wrongdoing, the scale of the problems it identified casts a shadow over the August 8 results. A new vote, with improved electoral procedures, would be an opportunity for him to try to secure a clearer mandate. For Odinga, the court decided in his favour, vindicating his longstanding complaints about the integrity of Kenya's electoral system. It did not, however, identify systemic fraud or evidence that the widespread irregularities and illegalities affected the outcome. For the IEBC, the judges did not find any electoral official individually culpable, but did identify major problems with its handling of results and demanded it adopt significant remedial measures, which the IEBC must do in full if it is to restore public confidence.

Little time remains before the expiration of the statutory 60-day deadline for holding a fresh election. Both Jubilee and NASA should approach forthcoming talks with the IEBC in a spirit of compromise to find a path forward. Both must avoid acting unilaterally or in ways that undercut the credibility of the vote or prospects for compromise. In that light, Jubilee's proposed amendments to electoral legislation should be shelved and such changes made only if they enjoy cross-party consensus.<sup>4</sup>

One way forward might be for both camps to embed an agreed number of party representatives in the IEBC to observe every stage of preparations. This would include, in particular, active monitoring of tallying and results transmission. A compromise along these lines would echo a 1997 deal pursuant to which then-President Daniel arap Moi agreed to the opposition appointing representatives within the electoral commission to avoid an opposition boycott. It could assuage fears of vote tampering and go some way to reassure NASA that the vote will be credible, even in the absence of sweeping changes in the IEBC's ranks.

The IEBC already has proposed significant changes to protect the integrity of the vote. These include requesting the United Nations Development Programme to print

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<sup>3</sup> Samwel Owino, "Leaked Chebukati memos reveal infighting in electoral body", *Daily Nation*, 20 September 2017.

<sup>4</sup> John Ngirachu, "Jubilee Party begins plan to change election law", *Daily Nation*, 28 September 2017.

ballot papers and results forms, a response to concerns raised by the Odinga camp over the independence of the Dubai-based Al Ghurair Printing firm which was awarded the tender for the August vote. The commission also has agreed to embed United Nations and Commonwealth experts within the electoral commission to monitor the IT system.

Before the election is held, the IEBC should take further steps to address problems identified by the court. Particularly important is that it develop and publicise its plan for the electronic transmission of votes from all 40,883 stations as required by law. It should heed the judges' suggestion that it put in place a backup system in case the electronic transmission system fails. And it should clarify how it will handle the polling results transmission from the 11,115 stations not covered by 3G mobile network in the last election. Electoral commission officials in many of these areas sent in results without accompanying scanned forms for verification of the tallies, one of the judges' chief complaints in annulling the vote.

Another priority is fresh training for all personnel, notably presiding and returning officers who will serve in polling stations and constituency tallying centres. Moreover, the IEBC should consult with representatives of the two camps on key decisions and procedures; the Election Technology Advisory Committee and Interparty Liaison Committee can serve as avenues for it to do so. The commission should communicate regularly and often to the public, avoiding late announcement of key procedures. The IEBC chair should inform all staff in writing that by law they must share information at the polling station level, including final tallies, with all party agents.

#### **IV. Lowering the Temperature**

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While a deal between the two camps on election administration would go a long way to cooling the fraught environment, Kenyan leaders should take additional measures. Here Kenyatta and Odinga could borrow a leaf from their counterparts in similarly high-stakes polls in other African powerhouses, Ghana and Nigeria. In particular, they publicly should pledge to pursue grievances related to the forthcoming vote in the courts not the streets. Consensus on election procedures might offer an opportunity for joint statements by the two candidates or other Jubilee and NASA leaders calling for a peaceful campaign. Their very appearance together would do much to reverse the polarisation deepening between the camps.

The leadership of both parties also should invest in greater efforts to curb hate speech. President Kenyatta took a welcome step on 12 September, when he condemned politicians from all sides who engaged in such discourse. That same day, the director of public prosecutions charged two senior figures – Moses Kuria, a Jubilee Party parliament member representing Kenyatta's home constituency and Johnstone Muthama, a leading opposition politician – with hate speech. Even so, widespread skepticism remains. Few senior Kenyan politicians have been successfully convicted for hate speech and doubts will be erased only when that changes. The office of the prosecutor and judiciary should prioritise such cases and ensure culprits on all sides are prosecuted in a timely and effective manner.

In the same vein, the government ought to call off its harassment of civil society groups. A week after the 8 August election, the board that supervises NGOs ordered

the closure of several prominent organisations, including some believed to be planning to challenge aspects of the vote in court. While a high court ruled the decision illegal and forced the government to backtrack, the board's attempt nonetheless sent a chilling message about the lack of tolerance for such groups' activities.

#### *A. Securing the Vote and its Aftermath*

Outbreaks of violence after the August vote largely were contained, but not before 24 protesters were killed, mainly by the police using force in opposition strongholds.<sup>5</sup> This time too, regardless of the outcome of the new polling, the potential for bloodshed is significant. Police are likely to deal with protests again, and it is vital they respond in a way that prevents or contains violence.

To improve such prospects, the Independent Policing and Oversight Authority – the state agency charged with probing police abuse – should expedite its investigation of the killing of protesters in August. The inspector general of police should issue instructions, including publicly, to officers to obey Kenyan law and avoid excessive force when handling protests. He also should provide security to figures playing a role in the wider electoral process, including judges. On 19 September, Chief Justice Maraga specifically complained about the failure of the police to heed requests for enhanced security for Supreme Court justices who have endured a campaign of vilification since their decision to annul the election.

#### *B. Lessons for Observers*

NASA leveled considerable criticism at international observers, accusing them of rushing to pronounce Kenyatta the winner in August. Here some correction is necessary. None of the preliminary statements by major observer missions could be read as wholesale endorsements of the vote, even if that was the impression created by subsequent media reporting.

That said, observers should adjust their approach based on the August precedent. The judges in the majority concluded that they could not rely solely on observers' preliminary statements because few missions "interrogated the process beyond counting and tallying at the polling stations". Given the controversy surrounding the electronic tabulation system, observers should negotiate with the IEBC terms for monitoring that system and focus there as well as on polling, counting and tallying in polling stations.

Observers also could review the timing of their initial statements after the polls, to take into account findings on results tabulation, or at least redouble efforts to make clear which aspects of the process those statements cover. In an interim statement issued on 14 September, the European Union team undertook to improve the clarity of its future communications and to consider allowing more time between the vote and its issuance of a preliminary assessment.<sup>6</sup>

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<sup>5</sup> "24 killed in post-election violence in Kenya, rights group says", CNN, 13 August 2017.

<sup>6</sup> "Recommendations for the Re-Run Based on Findings Since the 8 August Election Day", interim statement, European Union Election Observation Mission Republic of Kenya, 14 September 2017.

Critics of international observers nevertheless should be careful not to undermine the useful role independent voices can play, particularly in such a high stakes contest. To denounce them or seek their exclusion risks making the rerun more fraught still.

## **V. Conclusion**

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Kenyan elections too often are fierce contests for power, with the quasi-existential nature of competition between rival elites leading to violent fallouts before and after balloting. Though reforms after the 2007/2008 crisis and Kenya's new constitution went some way to addressing the zero sum political competition, politics remain rooted in ethnic polarisation and attempts to capture the spoils of the state.

In this light, the uncertainty over the rerun is particularly dangerous. The two camps ought to agree on a compromise that allows preparations for the vote to advance and prevents a crisis that could spill well beyond Kenya's borders, given its place as a regional anchor whose port serves economies including those of Uganda, Rwanda and the eastern Democratic Republic of Congo. In light of the extreme polarisation in Kenyan society, diplomats can help bring both camps together, press politicians to play constructive roles and encourage key institutions, particularly the IEBC and security forces to fulfil their duties impartially at an exceedingly delicate time for Kenya.

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## Appendix A: About the International Crisis Group

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Crisis Group's President & CEO, Jean-Marie Guéhenno, served as the UN Under-Secretary-General for Peacekeeping Operations from 2000-2008, and in 2012, as Deputy Joint Special Envoy of the United Nations and the League of Arab States on Syria. He left his post as Deputy Joint Special Envoy to chair the commission that prepared the white paper on French defence and national security in 2013.

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