UNIVERSITY OF NAIROBI
SCHOOL OF LAW

ACCESS TO JUSTICE: A CASE STUDY OF THE LEGAL AND INSTITUTIONAL FRAMEWORK, PROCEDURES AND PRACTICE IN RELATION TO ELECTION PETITIONS IN KENYA

PROJECT REPORT SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS (LL.M, LAW, GOVERNANCE AND DEMOCRACY)

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DECLARATION

I Jemimah Wanza Keli declare this project is my original work and has not been presented for a degree in any other University,

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This project paper has been submitted in partial fulfillment of the requirements for the Degree of Master of Laws under my certificate as the University Reader

Signed ..... Date 26/11/2012

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DEDICATION

To my dear husband, Solomon Kasina, sons Allan Keli and Victor Mbithi.
Thank you for your love, encouragement and support.

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APPRECIATION

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My gratitude goes to my learned friends in election petitions practice who agreed to be interviewed and took time to complete the questionnaire despite their busy schedules.

I will be eternally grateful to the Independent Electoral Commission Directorate of Legal Affairs staff for their generosity in allowing me to peruse decisions on election petitions in their office and providing a wealth of information on the process.

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ABBREVIATIONS

1.	Cap	Chapter
2.	ECK	Electoral Commission of Kenya
3.	IEBC	Independent Electoral and Boundaries Commission
4.	ICCPR	International Covenant on Civil and Political Rights
5.	ICJ-K	International Commission of Jurists – Kenya Section
6.	LSK	Law Society of Kenya
7.	NAPEA	The National Assembly and Presidential Elections Act
8.	UDHR	Universal Declaration on Human Rights

CHAPTER ONE: INTRODUCTION

Kenya has, in the past, held general elections after every five years for the president[1], members of parliament[2] and representatives to the local government.[3] The elected persons serve for a term of five years unless the president dissolves parliament earlier or a vacancy arises from death or resignation. After the elections, persons not satisfied with the elections process or the results, may file a petition to the courts.[4]

This study interrogates the legal and institutional framework, procedures and practice in relation to elections petitions in Kenya.

The legal instruments considered in this study are the relevant international and regional instruments, the former Constitution of Kenya, the Constitution of Kenya, 2010, the National Assembly and Presidential Elections Act (Chapter 7, Laws of Kenya), the Elections Offences Act (Chapter 66, Laws of Kenya) and the Elections Act, 2011. These instruments provide the legal and institutional framework and procedure of conducting election petitions in Kenya. The study examines the practice of the courts in determining election petitions by focusing on decided cases.

This chapter covers the background and statement of the problem, the objective of the study, the research questions, the significance of the study and envisaged contribution to the society, the theoretical framework upon which the concept of access to justice is based, literature review and the methodology of the study.

1.1 BACKGROUND TO THE STUDY

In ordinary usage, the term 'justice' refers to fairness or treating one in a reasonable manner. To do justice is to treat fairly or appropriately.[5]

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[1] The former Constitution, Section 5
[2] Op Cit, 1 ,Section 59
[3] Local Government Act, Chapter 265 (Laws of Kenya), Section 58
[4] Op Cit, 1, Section 44
[5] The Concise Oxford Dictionary of Current English, Ninth Edition, Oxford: Clarendon Press, page 737

According to the Black Law dictionary, justice means the fair and proper administration of laws.[6] This study uses the term 'justice' in the context of substantive justice, being, 'justice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting any of the parties' substantive rights; a fair trial on merits.'[7]

This study examines the extent of access to justice in the context of election petitions; whether citizens are able to use the available remedies when aggrieved by the conduct of elections and get a fair hearing and verdict in accordance with the substantive law.

Research conducted on behalf of the government of Kenya identified some of the essentials of access to justice as:

> 'Laws that are fair and accessible to the citizens in their form, language and physically; laws that contain simple and cheap procedures for achieving justice, fairness in the results of the dispute resolution processes and the literacy of the citizens who use the procedures and the institutions for the redress of their grievances.'[8]

Anderson Michael[9] in his article, 'Access to Justice and the Legal Process: Making Institutions Responsive to Poor People in the LDCs' states:

> 'Repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available remedies. The first and by far the most important is access to financial resources. Hiring lawyers and using legal institutions can be very costly in themselves, but also entail opportunity costs which for the poor usually means time away from income generating activities. The second factor usually identified is institutional skill, the ability to understand and use the system.'[10]

Anderson further identifies other factors of determining access to justice and which are mostly associated with developing countries, being:

> 'the reluctance to use the law, especially among the poor; mistrust of the law, especially among the urban poor who, due to the repeated illegalities, assume there must be something wrong with the law and use of alien idioms of the law, which is mainly expressed in foreign language, especially that of the colonial power or other foreign

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[6] Garner, B.A., Black's Law Dictionary, Eighth Edition, 2004, Washington: Thomson West
[7] ibid
[8] Okech-Owiti, and Wesselink, C., Legal Education and Aid Programme: A Pilot (unpublished): 22
[9] Anderson, M., 'Access to justice and legal process: Making legal institutions responsive to poor people in LDCs' IDS Working Paper 178, 2008, www.undp.org (accessed on 20th April 2011)
[10] Op Cit,9, page 16

> languages like French, Greek and Latin, and formality of language and precision of ritual. Legal training introduces the student of law to new vocabulary used to describe ordinary words in new terms for no good reason other than creating monopoly in the competency of understanding the law.'[11]

The foregoing provides a benchmark for assessing the extent of access to justice in the resolution of election disputes in Kenya.

The Constitution of Kenya, 2010[12] under Article 48, recognises access to justice as a fundamental right:

> 'The State shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.'

Under Article 38(2) of the Constitution, every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. Article 50 provides for the right to fair hearing in public before a court or, if appropriate, before another independent and impartial tribunal or body. Article 87 provides that Parliament shall enact legislation to establish mechanisms for timely settling of disputes.

The election petitions under study were determined under the former Constitution and the National Assembly and Presidential Elections Act (Chapter 7 of the Laws of Kenya). The Elections Act (No.24 of 2011), which repealed the National Assembly and Presidential Act and the Election Offences Act, came into effect on the 2nd December 2011.[13]

The Sixth Schedule to the Constitution provides for the extension of the application of the provisions of the former Constitution on election petitions and any other question as to the membership of the National Assembly until the first general election held under the Constitution.

There are various international and regional laws on elections, due process and the adjudication of election disputes. The Universal Declaration of Human Rights, at Article 21, recognizes the right to periodic and genuine elections. Article 8 provides for the right to effective remedy by competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.

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[11] Op Cit, 9, page 20-21
[12] Promulgated on the 27th August 2010
[13] L.N. 182/2011

The International Covenant on Civil and Political Rights (ICCPR), at Article 14, provides that: 'All persons shall be equal before the courts and tribunals'. Article 25(b) provides that:

> 'Every citizen shall have the right and the opportunity without any distinction of any kind and without unreasonable restrictions: to vote and be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.'

Article 7 of the African Charter on Human and People's Rights of 1981, is more specific and detailed on due process. It states:

> '1. Every individual shall have the right to have his cause heard. This comprises:
> (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
> (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
> (c) The right to defence, including the right to be defended by counsel of his choice;
> (d) The right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.'

The African Charter on Democracy, Elections and Governance[14] reaffirms the member states commitment to due process in election disputes. Article 17 requires States to establish and strengthen national mechanisms that redress election related disputes in a timely manner. The Charter also requires members to have a binding code of conduct which includes a commitment by political stakeholders to accept the results of the election or challenge them exclusively through established legal channels.

The African Commission on Human and Peoples' Rights, in its 2001 resolution, further provides for access to judicial services as follows:

> 'States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind such as discrimination based on colour, race, sex, ethnicity, religion, political opinion and economic status; take special measures to ensure that rural communities and women have access to

[14] Adopted by the Eighth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia, 30th January 2007

judicial services; take special measures in respect of groups or communities which have experienced injustices in the past by ensuring that judicial services are accessible to them; ensure that access to judicial services is not impeded, including by distance to the location of the judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedure and to complete formalities.'[15]

Kenya is a party to all the above cited international and regional legal instruments except the African Charter on Democracy, Elections and Governance, 2007. However, because of the fact that she is a member of the African Union, she has obligation to enforce the provisions of the treaty.[16]

The international and regional legal instruments discussed set out standards on due process against which the Kenyan legal framework is evaluated in this study. The municipal law which provides for the adjudication of post-election disputes has immense impact on access to justice in the judicial process for the litigants in election petitions.

1.2 STATEMENT OF THE PROBLEM

Historically, election petitions have been handled under the repealed National Assembly and Presidential Elections Act which had not provided for clear modes of service leading to the striking out of the majority of the election petitions at the preliminary stage.[17] The strict conditions and timelines on service left the petitioners without remedy if their petitions were struck out. The Elections Act of 2011 which repealed the National Assembly and Presidential Elections Act provides for two clear modes of service, in person and by advertisement in a daily national newspaper.

The requirement of compulsory deposit of security for costs, which has been revised upwards under the Elections Act, from a sum of Kshs.250, 000.00 for both presidential and parliamentary

[15] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Resolution 5 (k), 2001

[16] Independent Review Commission on the 2007 General Elections of Kenya (Krieger Report), 2008, Nairobi: Government Printer, page 12

[17] The Court of Appeal of Kenya has held that election petition rules are a special regime of law which must be adhered to strictly. See The Speaker of the National Assembly vs The Hon. James Karume, Civil Application Nairobi No. 92 of 1992, which authority was applied in Kipkalya Kones vs The Republic and others, Civil Appeal Nairobi, No. 94 of 2005

election petitions, to Kshs. 1,000,000.00 for presidential election petitions and Kshs. 500,000.00 for parliamentary elections respectively, is a precondition for admission of election petitions in court. This study discusses the impact of the requirement of the deposit of security for costs on access to justice in the context of election petitions.

According to the Final Report of the Task Force on Judicial Reforms,[18] a number of cases of the filed following the 2002 General Elections were determined as late as 2007, while some were not finalized at all by the time of subsequent general elections in 2007. Delay in determination of election disputes may mean that the disputed elected representative serves the entire term.

Past decided cases indicate that most of the election petitions were determined on procedural technicalities rather than merit. This study interrogates the technical aspect of the election petitions resolution process to assess how it affects access to justice.

The High Court, which sits mainly at the provincial headquarters and in major towns, retains jurisdiction over election petitions. The Constitution has created 47 Counties[19] yet there are only 16 High Court stations. Distance to court is a factor in determining whether all citizens are able to access court facilities for purposes of election petitions. There are currently sixteen (16) Court of Appeal Judges and 65 Judges of the High Court of Kenya.[20] The number of judges serving in the High Court is an important factor in assessing the capacity of the Judiciary to determine election petitions in a timely manner.

It is against this background that the study investigated the adequacy or inadequacy of the legal and institutional framework, and the effectiveness of the procedures and practices in promoting access to justice in relation to election petitions.

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[18] Chaired by Hon. Justice William Ouko, July 2010, Nairobi: Government Printer, page 51

[19] Article 6(1), First Schedule

[20] See Judicial Profiles posted at the Kenya law Reporting Council Website www.klr.go.ke (accessed on 13th March 2012)

1.3 RESEARCH OBJECTIVE

1.3.1 Broad objective

The main objective of this study was to establish the extent to which the legal and institutional framework, procedures and practice in relation to election petitions adequately promote access to justice.

1.3.2 Specific objectives

i) To assess the adequacy of the legal and institutional framework for the adjudication of election petitions in the context of access to justice.

ii) To identify the challenges in the procedures and practice in relation to the adjudication of election petitions and suggest how these may be addressed.

1.4 RESEARCH QUESTIONS

i) How adequate is the current legal and institutional framework on the adjudication of election petitions in the context of access to justice?

ii) What are the challenges in the procedures and practice in relation to adjudication of election petitions and how can these be addressed?

1.5 HYPOTHESIS

The hypotheses which this study proposed to test were:

i) The existing legal and institutional framework for adjudication of election petitions does not adequately facilitate or promote access to justice.

ii) The procedures and practices in adjudication of elections petitions impede access to justice.

1.6 THEORETICAL FRAMEWORK

The concept of access to justice is grounded on the theory of democracy and human rights. Democracy is about power and rule by the majority. In this study the theory of democracy and human rights provide the basis for evaluating the extent of access to justice in election petitions.

1.6.1 Democratic theory

The term 'democracy' is translated from the Greek noun *demokratia,* which means, one particular form of government.[21] John Dunn states that democracy began in Athens but not in the way the word is used today.[22] The Athens form of governance is considered to be a democracy because:

> 'It is administered with a view to the interest of the many, not of the few...it has also rendered its citizens equal before the law in their private disputes and equally free to compete for public honours by personal merit and exertion or to seek to lead the city, irrespective of their own wealth or social background.'[23]

Dunn argues that,

> 'in the study of the history of democracy, it is apparent that great scholars on governance, Plato and his pupil, Aristotle, had little confidence in the value of democracy to the human world. Plato loathed democracy and did so without inhibition. He saw democratic rule in essence as the rule of the foolish, vicious and always potentially brutal and a frontal assault on the possibility of good life lived with others on the scale of a community. Plato argued that there is no lasting shape to a democratic community and there is nothing reliable about the ways in which power is exercised within it.'[24]

Democracy, according to Aristotle, as handed down to medieval Europe and thus to modern understanding of politics was:

> 'A form of government which simply did not aim at a common good. It was a regime of naked group interest, unapologetically devoted to serving the many at the expense of the wealthier, the better, and the more elevated, the more fastidious or virtuous.'[25]

The Greek noun *demokratia,* has been adopted to define democracy as we know it today: that the people hold power and exercise rule. That is what the word also meant to the people of Athens.[26]

Larry Diamond[27] defines democracy broadly by identifying its components:

> 'civilian, constitutional system in which the legislative and chief executive offices are filled through regular, competitive multiparty elections with universal suffrage; control

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[21] Dunn, J., Setting the people free: The story of democracy,2005, London: Atlantic Books: 15
[22] ibid
[23] Op Cit,21, page 26, citing from, Thucydides, History,II,xxxvii,1-2, page 322-323
[24] Op Cit,21, page 45
[25] Op Cit,21, page 50
[26] ibid
[27] Diamond, L., 'Defining and Developing Democracy', Journal of Democracy, 1999, Baltimore: The John Hopkins University Press, page 11

> of the state lies with elected officials and, in particular, the military is subordinate to the authority of the elected civilian officials; executive power is constrained constitutionally and, in fact, by the autonomous power of other government institutions such as an independent judiciary and parliament; electoral outcomes are uncertain with significant opposition vote and presumption of party alternation in government and no group that adheres to constitutional principles is denied the right to form a party and contest elections; cultural, ethnic, religious and other minority groups are not prohibited legally and in practice from expressing their interests in the political process; individuals have substantial freedom of belief, opinion, discussion, speech, publication, assembly, demonstration and petition; citizens are politically equal before the law, and a constitution that is supreme.'[28]

Diamond's definition of democracy captures its essence and, of significance, highlights important concepts of democracy that underlie elections. It is impossible for any state to allege to be democratic if it lacks regular, competitive multiparty elections with universal suffrage. The elections must be free and fair and that can only happen if the freedoms of speech, expression and movement are respected by the executive and enforced by an independent judiciary.

Walter Murphy states that that democratic theory is based on a notion of human dignity:

> 'As beings worthy of respect because of their very nature, adults must enjoy large degree of autonomy, a status principally attainable in the modern world by being able to share in the governance of their community. Because direct rule is not feasible for the mass of citizens, most people can share in self-government only by delegating authority to freely chosen representatives.'[29]

Murphy upholds election as a crucial ingredient of democracy and adopts Justice Hugo L. Black's position on the critical element of democratic theory by citing his expression thus:

> 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which we must live.'[30]

In Kenya, the concept of democracy is enshrined in Article 4 (2) of the Constitution, which states that:

> 'The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred in Article 10.'

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[28] ibid

[29] Murphy, W., Constitutions, Constitutionalism and Democracy', in Greenberg, D., et al, *Constitutionalism and Democracy*, 1998, University of South Pacific, http://www.vanuatu. usp.ac.fj/courses/LA207 (Accessed on 31st May, 2011)

[30] Ibid, page 3

The principles in Article 10 of the Constitution include patriotism, national unity, sharing and devolution of power, democracy and participation of people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.

An independent and impartial dispute resolution mechanism gives and or contributes to the legitimacy of election results.

1.6.2 Human Rights

Human rights are the rights that one has simply because one is a human being. Jack Donelly states that:

> 'Human rights are equal rights: one either is or is not a human and therefore has the same human rights as everyone else (or none at all). They are inalienable rights: one cannot stop being human no matter how bad one behaves or how barbarously one is treated. They are universal rights in the sense that today we consider all human beings members of the species homo sapiens and thus holders of human rights.'[31]

The definition by Donnely can be interpreted to mean that human rights are natural rights given by nature or by the creator depending on whether one believes in the theory of evolution or creation with respect to the existence of human beings. Donnely states that:

> 'Human rights are held universally by all human beings and universally hold also against all other persons and institutions and as the highest moral rights they regulate the fundamental structures and practices of political life and in ordinary circumstances they take priority over other moral legal and political claims. These dimensions encompass what he calls moral universality of human rights.'[32]

The Universal Declaration of Human Rights sets out the standards for human rights which the United Nations members are required to meet in their domestic affairs. This declaration recognizes the need to subject human rights to limitations particularly the freedoms for the purposes of protecting the rights of others and the interests of the wider society in general.

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[31] Donnely, J., Universal Human Rights in Theory and Practice, Second edition, New York: Cornell University Press, 2003, http://cornellpress.cornell.edu (accessed 30th April 2011)

[32] Ibid, page 10

Human rights have been classified into three generations. This classification was first proposed by Karel Vasak at the International Institute of Human Rights in Strasbourg. His classification follows the principles of liberte, egalite and fraternite of the French revolution.[33] The first generation rights are related to liberty and refer fundamentally to civil and political rights. The second generation rights related to equality including economic, social and cultural rights. The third generation or 'solidarity' rights cover group and collective rights, which are inter alia, the right to development, the right to peace and the right to clean environment. Apart from the right to self-determination, the only other right which has been given official human rights status is the right to development.

The 1993 Vienna Declaration and Programme of Action (paragraph 1, 10) confirms the right to development as a collective as well as an individual right, individuals being regarded as the primary subjects of development.[34]

The human rights approach to elections as elucidated in the various international human rights instruments and as enshrined in the Constitution means that citizens are entitled to receive justice in matters related to disputes arising from the election process. The study adopts the concepts of democracy that underlie elections and human rights which underlie efficacious resolution of disputes.

1.7 LITERATURE REVIEW

Several books and articles exist on the subject of access to justice and election disputes resolution.

Dennis Petit in his article, 'Resolving Election Disputes in the Osce Area: Towards a standard Election Monitoring System,'[35] sets out the fundamental issues in election dispute resolution theories such as the validity of the result and therefore the right to challenge the outcome of elections; the administrative action of election officials to correct a problem, which infers the

[33] Icelandic Human Rights Centre., 'The Concepts of Human Rights: Definitions and classifications' http://www.humanrights.is (Accessed 30th April 2011)

[34] ibid

[35] Petit, D., 'Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System', 2000, Warsaw: Office for Democratic Institutions and Human Rights www.osce.org/odihr (accessed on 21st June 2011)

right to seek redress for violations of suffrage rights and criminal prosecution against those who have corrupted or attempted to corrupt the election process.

Petit sets out generic guidelines for election dispute resolution that are generally accepted as being good principles and practice in addressing election-related disputes. The guidelines set the parameters for election dispute resolution mechanisms which comply with the rule of law. Some of the guidelines are principles of justice or are related to fundamental rules embodied in international legal instruments while others are practical.[36]

One of the crucial guidelines discussed by Petit relevant to our study is promptness of the proceedings: time limit and deadlines.

Petit observes that:

> 'Considering that the conduct of election requires prompt decisions and action within a pre-determined timeframe, the procedures governing election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadline and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals.'[37]

Petit cautions that time limits should allow courts sufficient time to process, review and make decisions upon the complaints and appeals submitted to them.

The guidelines set by Petit address other issues of practice in election disputes. These are hierarchical appellate procedure, accessibility and transparency, invalidation of election results, admissibility of complaints and appeals, enforcement of court decisions, consistency in the interpretation and application of election dispute provisions and prosecution of election offences, irregularities and violations of the electoral law. The article is relevant to this study as it addresses critical aspects of election disputes resolution process and sets standards.

Michael Anderson, in his article, 'Access to Justice and the Legal Process: Making Legal Institutions Responsive to Poor People in LDC's', observes that:

> 'Even where the courts are constitutionally protected, the judiciary independent and the laws drafted in fairness to the poor, the legal system will be of little benefit to the poor unless they are able to use the levers that it makes available.'[38]

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[36] ibid
[37] Op Cit,35, Principle D (19)
[38] Op Cit,9, page16

Anderson further observes that,

> 'Repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available legal remedies.[39] The first factor, and by far the most important, is access to financial resources for hire of lawyers and payment of costs to legal institutions. The second factor is institutional skill, that is, the ability to understand and use the system.' [40]

Anderson further discusses other factors arising particularly in developing countries:

> '(i) Reluctance to use the law in some cultures especially among the poor due to stigma attached to encounter with the law; living in illegality especially by the poor living in urban areas as they often construct their shelters and business premises on illegally occupied land, do illegal businesses and hence live in permanent condition of illegality;
> Mistrust of the law by the poor who think it is a tool the wealthy use against them;
> Alien idioms of the law, in the first sense, the law in developing countries is expressed in foreign language even though only a small proportion of the population can speak English in these jurisdictions and the language is often associated with the injustice of colonial rule. The second sense in which the law is foreign is that its most fundamental concepts, including notions of identity and causation are commonly at odds with the frame for reference used by local communities.
> ii) Access to legal information and legal literacy. Many developing countries lack academic resources to produce legal textbooks for use by judges and lawyers leading to reliance on textbooks from other jurisdictions even though the law may be different. Lack of a comprehensive and timely system for publishing laws poses a challenge for the lawyers and their clients.
> iii) Inadequate legal representation. Lawyers are in short supply and in some cases lawyers develop practices focusing on lucrative commercial or government work rather than representing the poor against abusive state powers.
> iv) Delay in delivery of justice. The author argues that where cases are heard promptly, decisions are broadly predictable and likely to be enforced. Unfortunately he observes that most court systems in developing countries are very slow.'[41]

The article by Anderson is relevant to this study as it defines the components of access to justice.

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[39] Author cites Cappelletti, M. and Garth ,B.(eds),1978, Access to Justice I: a world survey, Alphen Rijn:Sijthoff and Noordhoff and Galanter, M., 1974, 'Why the "haves" come out ahead: speculations on the limits of legal change', *Law & Society Review* 9, page 95-160

[40] Op, Cit,9, page 16

[41] ibid

Grey, Jr., in his article, 'Access to the Courts: Equal Justice for All,'[42] observes that:

> 'An independent judiciary is the guardian of individual rights in a democratic society. In order for the citizens to have faith in their court system, all the people must have access to the courts when necessary.'[43]

Grey argues that denial of access to the courts forces the people to refer dispute resolution into other arenas and results into vigilantism and violence. The mere access to the courts in theory or legal sense is not enough; it is the results that flow from the decisions made by the courts that give it meaning. For example, the value of access is evident when the courts decide that no one, especially those in positions of power, is above the law.

The article is relevant to this study as it give emphasis to the important role of the courts in election dispute resolution.

In their report of 2006 entitled 'The State of the rule of law in Kenya' the Kenya Section of the International Commission of Jurists (ICJ-K) states that judicial reforms in Kenya should aim to achieve five objectives namely:

> 'To restore public confidence in the judiciary; make the judiciary more transparent, independent and accountable by changing the way in which judges are selected, evaluated, promoted, disciplined and removed from office; speed up the settlement of cases and eliminate back-log by adequately resourcing courts, training judges and magistrates, computerizing registries and enacting reforms that eliminate delays and expenses; increase citizen access to the courts and to effective remedies by enhancing access to legal aid and information and to mediation, alternative dispute resolution mechanisms, developing small claims courts and transferring non-contentious matters, such as the probate of uncontested wills and letters of administration to administrative agencies; and secure an independent legal profession and modernize legal training to reflect changing global realities such as human rights protection and the threat of terrorism.'[44]

The essence of the report is to grapple with the issues of broadening access to justice in Kenya, such as, the improvement of access to legal aid, development of small claims courts and having a

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[42] Grey. R. Jr., 'Access to the Courts: Equal Justice for All', Issues for Democracy, IIP Electronic Journals, Vol.9 No.2, August 2004 www.lawsource.com (Accessed on 30th May 2011)

[43] ibid

[44] International Commission of Jurists (Kenya Section), The State of the Rule of Law in Kenya, 2006, page 16

transparent manner of appointment of judges. The report does not focus on access to justice in the context of election petitions.

Autheman in his article, 'The Resolution of Disputes Related to Election Results,'[45] observes that, dispute resolution is the climax of the election process and that legitimacy of the election process depends in part on the objectivity and impartiality of the dispute resolution mechanism. Autheman argues that one of the ongoing challenges for emerging and established democracies is to master the election process and ensure that any dispute challenging election results is resolved in a timely, fair and effective manner. The focus of the paper by Autheman is on the existing case law on how courts in Asia and globally have resolved disputes related to election results. The article is relevant to this study as it demonstrates the contribution of an impartial dispute resolution mechanism to the legitimacy of the electoral process.

Ndung'u, C., in his article 'Kenya's Election Petition Experience in the Multi-Party Era,' [46] discusses the circumstances under which elections petitions have been determined. The author questions the ability of the judiciary to be a fair adjudicator in view of political influence since 1991. The article is useful in understanding the practice of the courts in the multiparty era. But it is not based on any defined standards of access to justice.

Butt, A., in his article 'The Role of Electoral Dispute Resolution Mechanisms in Africa,' [47] discusses the various models of election dispute resolution mechanisms both formal and informal. The formal mechanisms refer to the constitutional, legal and institutional or administrative systems that are established to enable the prevention or resolution of election disputes. The author states that there are three basic formal election dispute resolution mechanisms. These are the electoral management bodies themselves, special electoral tribunals and ordinary courts. The informal election dispute resolution mechanism is an extrajudicial

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[45] Autheman, V., 'The Resolution of Disputes Related to "Election Results": A snapshot of Court Practice in Selected Countries Around the World', IFES Rule of Law Conference Paper Series, February 2004, www.ifes.org/publication (Accessed on 2nd August 2011)

[46] Ndungu, C., 'Kenya's Election Petition Experience in the Multi-Party Era', in *Towards an Election Dispute Resolution Model for Kenya*, 2009, Nairobi: International Commission of Jurist, Kenya Section: Chapter 2

[47] Butt, A., 'Managing Conflict: The Role of Electoral Dispute Resolution Mechanisms in Africa', in Ogada, M., (ed), *Electoral Reform In Africa: Challenges and Opportunities*, 2009, Nairobi: International Commission of Jurists, Kenya Section: Chapter 8

arrangement used to address election disputes. It becomes especially relevant when there is a loss of trust in established judicial systems. Such mechanism was used in Kenya in 2008 to end the post-election crisis through the former UN Secretary-General Kofi Annan-led mediation process. The Article is relevant to this study as it provides indepth understanding of the various modes of dispute resolution mechanisms applied in Africa and their suitability.

1.8 RESEARCH METHODOLOGY

This study required data to describe and interrogate the legal and the institutional framework, the conditions of practice, the period taken in determination of election petitions, the cost of election petitions, the practicability of the procedures and the adequacy of the institutions.

The study used quantitative and qualitative data. Qualitative data was collected through in-depth interviewing of the Directorate of Legal Affairs staff[48] from the Independent, the electoral body[49] and the elected candidates in election petitions[50] and, at least, one judge of the High Court[51]. The data was collected in the month of October and November 2011. The information derived from these interviews supplemented information acquired through quantitative data arrived at through library research. Unstructured questionnaires and informal interviews were used to gather qualitative data.

The desk review covered the following documents:

i) The former Constitution of Kenya

ii) The Constitution of Kenya, 2010

iii) Acts of parliament relevant to elections and election disputes, namely, the National Assembly and Presidential Elections Act (Chapter 7 Laws of Kenya) and the Election Offences Act (Chapter 66 Laws of Kenya); the Elections Act, Act No. 24 of 2011, which repeals Chapters 7 and 66 of the Laws of Kenya.

iv) Judgments and rulings of the Court in relation to election petitions

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[48] Praxedes Tororey, Director Legal Affairs, IEBC and Salome Ayugi, Legal Officer, IEBC
[49] Mutua Nzioki Advocate and Johnson Adere Advocate
[50] Justus Munyithya Advocate and George Kithi Advocate
[51] Justice Mabeya

v) International and regional instruments relating to standards and practices of access to justice in general and elections and electoral disputes in particular

vi) Report of the taskforce on judicial reforms of July 2010

vii) Report of the Independent Review Commission on the general elections held in Kenya on 27th December 2007.

1.9 SUMMARY

The data collected was analyzed in two main categories:

1. The legal and institutional framework
2. Procedures and practice in relation to election petitions

1.9.1 The Legal and Institutional framework

In this study the relevant international, regional and national legal frameworks were reviewed. At the international and regional level it was found that there exists a comprehensive legal framework on the conduct of elections and resolution of election disputes. The international instruments reviewed were the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the General Comment No. 25 and the Declaration on Criteria for Free and Fair Elections.

The regional instruments reviewed were the African Charter on Human and Peoples' Rights, the African Commission on Human Rights, 2001 Resolution, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the African Charter on Democracy, Elections and Governance and the Harare Declaration on Criteria for Free and Fair Elections.

At the national level the legal framework was found to be inadequate to guarantee access to justice. The legal framework does not meet the international standards on efficient and timely determination of elections disputes. The laws reviewed other than the Constitution were, the Elections Act; the Judicature Act; the Judicial Service Act; the Vetting of Judges and Magistrates Act; the National Assembly and Presidential Elections Act and the Election Offences Act.

1.9.2 Procedures and Practice in election petitions

Data was collected on the various aspects of practice in election petitions and specifically on service, security for costs, time taken to determine election petitions and challenges met by parties in the election petition (the petitioner, the elected candidate and the electoral body), the judges' capacity to handle elections petitions and physical access to courts.

The law on service under the repealed National Assembly and Presidential Elections Act was said to have been complex. The Elections Act provides for two alternative modes of service: in person or advertisement in a daily newspaper. Service in person is difficult as most elected candidates engage in various tactics immediately the election results are announced to evade service. It was proposed that the law should be amended to allow service on appointed advocates.

The procedure for making deposit on security for costs was said to be stringent. It was proposed that the law should be made flexible to allow alternative to cash deposit on security for costs like, title deeds, logbooks, bond certificates and other similar documents. It was said there is no reasonable justification why deposit on security for costs is payable in election petitions in respect to county government and parliamentary elections.

Due to time taken to determine election petitions, rated from the data collected, to range between 1 to 5 years, it was said that the elected candidate is unable to concentrate on parliamentary business to the detriment of the constituents. The legal costs and witness expenditure incurred by parties to the election petition are aggravated by the long period it takes to determine the election petition. The electoral body faces the challenge of having to keep in safe custody the ballot material required in the election petitions.

The electoral body has in the past incurred huge legal costs for representation in court due to the high fees charged by advocates. The electoral body is also faced with the challenge of enormous costs awarded by the courts against it in election petitions even to the losing parties in some cases. The huge costs awarded also affects the other parties who have to pay unreasonable costs to their advocates.

The capacity of the Judiciary to handle election petitions was said to be inadequate. There is no election disputes division or registry in the Judiciary for management of election petitions. The judges also have to deal with other routine cases and this was said to be one of the reasons election petitions are not determined in a timely manner. Some of the judges were said to be impartial in dealing with election petitions and this was attributed to bribery, fear and political affiliations. Further it was said that the Judiciary was greatly understaffed and the few judges of the High Court were overwhelmed by the volume of work hence the delay in final determination of election petitions.

Physical access to the Judiciary is inadequate. There 47 counties in the country served by seventeen (17) High Court stations namely: Nairobi, Mombasa, Malindi, Machakos, Embu, Meru, Kakamega, Bungoma, Busia, Kericho, Nakuru, Eldoret, Kitale, Kisii, Kisumu, Nyeri and Garissa. In some cases the High Court stations are very far from the constituencies and this leads to increased costs of litigation.

It was also established that there are no suitable facilities, in the Judiciary's buildings, for persons with disability. Only Milimani Law Courts have lifts but there is no provision for voice directions to guide the blind persons.

CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORK FOR ELECTION PETITIONS

2.1 Introduction

Election petitions constitute an integral part of the democratic electoral process. Without an accessible judicial process, the electoral process cannot satisfy the test of free, fair and transparent elections. The Director of the African programme of the International Commission of Jurists observes that 'people need to enjoy fundamental freedoms if they are to meaningfully participate in the civic affairs of their nation'.[52]

This chapter discusses, in detail, the legal and institutional framework for election petitions at the international, regional and national level. It sets out the standards to govern elections and election petitions.

2.2 International framework

The international legal frameworks discussed in this part are derived from the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the General Comment No. 25 and the Declaration on Criteria for Free and Fair Elections.

2.2.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR)[53] was proclaimed by the United Nations General Assembly as 'a common standard of achievement of all people for all nations'.[54] As such, the Declaration represents a significant standard of adherence for handling of election petitions. Specifically, Article 7, which guarantees the equality of all before the law without any discrimination, is important in ensuring that every aggrieved person is not discriminated against in petitioning the courts where a breach has occurred. Article 8 is crucial in guaranteeing that an

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[52] Atsunga, A., 'Rule of Law and Elections in Africa - Recent Experiences', A paper presented at the Annual General Meeting of the Tanganyika Law Society held at Dodoma, Tanzania between 13th and 14th August 2010

[53] Adopted by the General Assembly Resolution 217A (III) of 10th December, 1948

[54] ibid., preamble

aggrieved individual will be able to obtain an effective remedy dispensed by a competent national tribunal as a matter of right. Article 10 secures the right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations.

These provisions are basic standards for any tribunal or court handling election petitions in order to ensure fair trial.

2.2.2 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)[55] was subsequently adopted to entrench the civil and political rights provisions of the UDHR in a legally binding instrument. The provisions most relevant to this study are Articles 25 and 26.

Article 25 secures the right and opportunity of every citizen to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections which are by universal suffrage and held by secret ballot, guaranteeing the free expression of the will of electors and to have access on general terms of equality to public service of his or her country.

Article 26 secures the right to equality of all persons, without any discrimination, to the equal protection of the law. In this respect, the law prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2.3 General Comment No. 25

According to the General Comment No. 25 by the United Nations Human Rights Committee, it is the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR) are essential to ensure the accountability of

[55] Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16th December 1996, entry into force 23rd March 1976, in accordance with Article 49

representatives for the exercise of the legislative or executive powers vested in them.[56] The General comment No. 25 also provides:

> 'Having regard to the provision of Article 5, paragraph 1, of the Covenant, any rights recognized and protected by Article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.'

2.2.4 Declaration on Criteria for Free and Fair elections

The Declaration on Criteria for Free and Fair Elections[57] is by the Inter-Parliamentary Union.[58] The Union is an international organization of parliaments of sovereign states. The Declaration reaffirms the significance of the UDHR and the ICCPR, which establish that, the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections.[59] The Declaration urges Governments and Parliaments throughout the world to be guided by its principles and standards.

The Declaration's principles and standards cover free and fair elections. The main principle is that the authority of government can only derive from the will of the people as expressed in genuine periodic elections. Such elections should be held at regular intervals, and on the basis of universal, equal and secret suffrage.[60] The voting and election rights principle is that every adult citizen has a right to vote in elections, by secret vote and in a nondiscriminatory manner.[61] The candidature, party and campaign rights and responsibilities entail the right of every citizen to take part in the government of their country by having equal opportunity to be a candidate in election, the right to join or jointly with others establish a political party, the right to express political opinions without interference, the right to move freely within the country in order to campaign for election, equal access to mass communication media, the right of every individual and every political party to the protection of the law and to a remedy from violation of political

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[56] General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25 of ICCPR), Adopted by the Committee at its 1510th meeting (fifty seventh session) on 12th July 1996

[57] Unanimously adopted by the Inter-Parliamentary Council at its 154th Session, Paris, 26th March 1994

[58] The organization was established in 1889 by the United Kingdom and France. Current members of the organization are 157 parliaments of sovereign states, www.ipu.org (accessed on 6th December, 2011)

[59] Article 21 of the UDHR

[60] Declaration on the Criteria for Free and Fair Elections., Section 1

[61] Op Cit,60, Section 2

and electoral rights, and the right of appeal to a jurisdiction competent to review any decisions affecting the right to be a candidate or to vote which should correct the error promptly and effectively.[62] A further principle describes responsibilities of the states to take necessary steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections in accordance with their obligations under international law.[63] Section 4, paragraph 9, implores states to ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as the elections management body or the courts.

The Inter-Parliamentary Union is not a legislative body and its declarations and resolutions are not attributable to States.[64] The authority of the criteria set out in the Declaration derives not so much from the endorsement by the Inter-Parliamentary Council, though the nature of membership of the body is significant, but from their foundation in international law and in the practice of the States and international organizations.[65] What the body did was to translate, but not legislate, those principles into a single set of applicable criteria.[66]

The authority of the 1994 Declaration has since been confirmed by the United Nations General Assembly[67] and incorporated in the practice of international organizations such as the United Nations Electoral Assistance Division and the United Nations Development Programme, and regional organizations such as the African Union.[68]

The Declaration summarizes the standards for elections and election disputes determination set out in the various international instruments. It is, therefore, a quick reference.

2.2.5 Overview

The international framework discussed above upholds the ideals of democracy and human rights, in relation to elections and elections petitions. In summary, these are the right to free and fair

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[62] Op Cit,60, Section 3
[63] Op Cit,60, Section 4
[64] Guy, S.G., Free and Fair Elections, New expanded edition, 2006, Oxford: Inter-Parliamentary Union, page 3
[65] ibid
[66] Op Cit,64
[67] Resolution 49/190 of 23rd December 1994
[68] Op Cit,52

trial in public by a competent and independent tribunal; equality of all before the law; the right and opportunity of every citizen to participate in public affairs of their country either directly or through freely chosen representatives; the right to vote and be elected at genuine periodic elections which are by universal and equal suffrage, and the right of appeal to an independent and competent tribunal, which should correct the error promptly and effectively.

2.3 Regional Framework

The instruments discussed here are the African Charter on Human and Peoples' Rights, African Commission on Human Rights, 2001 Resolution, the African Charter on Democracy, Elections and Governance and the Harare Declaration on Criteria for Free and Fair Elections.

2.3.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights[69] provides a comprehensive framework for human and peoples' rights in the context of Africa. Article 7 secures the right of every individual's cause to be heard. With regard to elections, Article 13 secures the right of citizens to participate in the government of their country, either directly or through freely chosen representatives in accordance with the provisions of the law.

Article 30 of the Charter establishes the African Commission on Human and Peoples' Rights. The Commission consists of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights.[70]

One of the mandates of the Commission is to formulate principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms. African Governments may base their legislation on rules and principles formulated by the Commission.

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[69] Enacted subsequent to Decision 115 (XVI) of the Assembly of Heads of States and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17th to 20th July 1979 on the preparation of 'a preliminary draft on an African Charter on Human and Peoples' Rights, providing, inter alia, for the establishment of bodies to promote and protect human and peoples' rights'

[70] The African Charter on Human and Peoples' Rights, Article 31

The Commission may cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[71]

2.3.2 African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance[72] was inspired by the objectives and principles of the Constitutive Act of the African Union on good governance, popular participation, the rule of law and human rights.[73]

The Charter has several objectives cutting across governance, democracy and elections. Those relevant to elections and election petitions are: to promote the holding of regular free and fair elections, to institutionalize legitimate authority of representative government as well as democratic change of government, to promote and protect the independence of the judiciary and to promote best practices in election management for purposes of political stability and good governance.[74]

The Charter emphasizes the importance of democratic institutions and calls for the establishment of institutions that promote and support democracy and constitutional order.[75] Autonomy and independence of such institutions should be guaranteed by the constitution.[76]

The Charter obligates States to establish and strengthen national mechanisms that redress election-related disputes in a timely manner and in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.[77]

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[71] Op Cit,70, Article 45
[72] Adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30th January 2001
[73] Article 3 and 4 of the Constitutive Act of the African Union
[74] African Charter on Democracy, Elections and Governance, Article 2
[75] Op Cit,74, Article 15
[76] ibid
[77] Op Cit,74, Article 17

It is the responsibility of the State parties to initiate appropriate measures, including legislative, executive and administrative actions, to conform national laws and regulations to the Charter and incorporate the commitments and of the Charter in national policies and strategies.[78]

Towards these ends, the African Union Commission on Human and People's Rights shall develop benchmarks for the implementation of the commitments and principles of the Charter and evaluate compliance.[79]

Kenya has not ratified the treaty. Appeal has been made to the Kenyan Government to ratify the Treaty before the conduct of the next general elections so that its progressive provisions may enrich the national legal framework.[80] The Charter reinforces national values and principles of governance in the Constitution and, therefore, will complement the implementation of the Constitution.[81]

2.3.3 The Harare Commonwealth Declaration

The Harare Commonwealth Declaration[82] reaffirms the focus on a number of areas of concern to the principles to which the Commonwealth is committed. The Declaration reaffirms the protection and promotion of the fundamental political values of the Commonwealth as democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government and fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.

2.3.4 Overview

The regional framework is intended to address legal and political problems in Africa. The regional framework as contained in the various charters and protocols is inspired by the

[78] Op Cit,74, Article 44
[79] ibid
[80] Press statement by State and Non- State actors, 'Building a Framework for Credible Elections and Democratic Governance in Kenya', Daily Nation Newspaper, 26th October 2011, page 46
[81] ibid
[82] Adopted in Harare on 20th October 1991 by the Heads of Governments of the Countries of the Commonwealth

Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. In summary, the regional framework upholds the right to fair trial held in public, the right to appeal in election disputes and have the decisions made promptly and efficiently by an independent and competent tribunal, the right to participation by citizens in the public affairs, and the right to vote and be elected at genuine periodic elections which are by universal and equal suffrage.

2.4 National Framework

The national framework for election petitions is governed by the Constitution of Kenya, 2010, the former Constitution of Kenya in so far as it is applicable, the National Assembly and Presidential Elections Act, the Election Offences Act and the Elections Act.

2.4.1 Procedural Framework

Former Constitution of Kenya

The Sixth Schedule to the Constitution of Kenya, 2010, Section 3, extends the application of the provisions of the former Constitution with respect to registration of voters, election petitions, the Executive and Parliament until the first general elections held under the Constitution, 2010.

The former Constitution provides for election of the President under Section 5 and election of members of Parliament under Section 32. The relevant criteria for qualification and disqualification of electoral candidates are set out in Section 34 and 35. Section 44 provides for the jurisdiction of the High Court to hear and determine any question as to whether a person has been validly elected to the National Assembly or a seat has become vacant. Section 44 provides that Parliament shall legislate on the powers, practice and procedure of the High Court in relation to election petitions. The provisions are legislated under the National Assembly and Presidential Elections Act and the National Assembly Elections (Election Petitions) Rules.

The National Assembly and Presidential Elections Act

The National Assembly and Presidential Elections Act[83] has been the main law on elections and election petitions until the enactment of the Elections Act, 2011.[84] Election petitions lie to the High Court to, among other things; determine whether a person has been validly elected as a member of the National Assembly[85]and whether a seat of a member of the National Assembly has become vacant.[86] Appeals from the High Court lie to the Court of Appeal within 30 days of the decision.[87]

The National Assembly and Presidential Elections Act further provided that a petition was to be heard and determined on a priority basis[88]and the election court was to decide all matters that came before it without undue regard to technicalities.[89]

The mode of service for election petitions under the Act was personal; failing which service is by publication in the Kenya Gazette and in at least one daily English and one Kiswahili daily newspaper with the highest national circulation. The challenge in this provision has been the requirement of proof of exercise of due diligence in personal service of the petition before resulting to the other options.

An important provision in the determination of election petitions states:

> 'No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in that written law or that the non-compliance did not affect the result of the election.'[90]

This provision left gaps for interpretation by the election court and was easy to manipulate. Also important are the Rules created under Section 23 of the Act, the National Assembly Elections (Election Petitions) Rules, dealing with the procedure for filing, trial and concluding of election petitions. Rule 4 prescribes the content and form of election petition. Rules 9 and 10 provide for

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[83] Chapter 7 (Laws of Kenya)
[84] Commencement date being 2nd November 2011, L.N. 182/2011
[85] Op Cit,83 Section 19
[86] ibid
[87] Op Cit,83, Section 23
[88] Op Cit,83, Section 19 (4)
[89] Op Cit,83, Section 23(1)(d)
[90] Op Cit,83, Section 28

legal representation of the parties to the petition. Rule 14 prescribes the manner of service of the petitions. This Rule provides service shall be through an appointed advocate and if no such advocate is appointed, by a notice published in the Gazette stating that a petition has been presented and a copy may be obtained from the Registrar on application.

The provision contradicts the provisions of the main Act[91] and is thus inapplicable. Rule 18 provides for filing of witness affidavits not less than forty-eight hours before the date fixed for the hearing of the petition. Rule 19 is critical in the determination of the election petition as it prescribes the documents the Returning Officer must deliver to the Registrar of the High Court forty-eight hours before the date fixed for the hearing.

The Rules are important as they prescribe the procedure for determination of the election petitions.

Election Offences Act

The Election Offences Act, now repealed by the Elections Act, was intended to prevent election offences, and corrupt and illegal practices at elections. The Act is significant, in this study, because at the conclusion of the trial of an election petition, the election court reports in writing to the Speaker of the National Assembly whether an election offence has or has not been committed by any person in connection with the election and the names of the persons who have been proved at the trial to have been guilty of an election offence.[92]

The Elections Act, 2011

The Elections Act repeals the National Assembly and Presidential Elections Act and the Elections Offences Act.

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[91] Op Cit, 83, Section 20

[92] Chapter 66 (Laws of Kenya), Section 31

The significant changes on election petitions introduced under the Elections Act of 2011 are: provision for a further 15 days for service of the petition after filing,[93] provision for alternative mode of service (personal or by advertisement in a newspaper with national circulation),[94] and a substantial increase in security for costs. In an election petition challenging presidential elections, the security for costs has been increased from two hundred and fifty Kenya shillings to one million. With respect to election petitions challenging election of members of Parliament or County Governors the security for costs has been fixed at five hundred thousand shillings. Security for costs has been introduced in the sum of Kenya shillings one hundred thousand with respect to petitions challenging the election of members of the County Assembly. The time for making the deposit has been increased to 10 days from 3 days after filing of the petition.[95]

Another significant provision introduced gives power to the election court to direct the electoral management body to issue a certificate of election to a president, a Member of Parliament, or a member of County Assembly if upon recount of ballots cast, the winner is apparent, but on condition that the person has not committed an election offence.[96] This provision is a positive development of law to enable the courts declare the rightful election winner and save on the amount of public funds spent on by-elections arising from election petitions.

The Act also provides that county election petitions shall be heard and determined within six months of filing. The other provisions on the election petitions are similar to those under the National Assembly and Presidential Elections Act. The Act came into operation on the 2nd November 2011 and has not been applied in any election petition.

2.4.2 Institutional framework

Other than the Constitution, the institutional framework is governed by the Judicature Act, the Judicial Service Act, the Supreme Court Act and the Vetting of Judges and Magistrates Act.

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[93] Act No. 24 of 2011 (laws of Kenya), Section 78
[94] Op Cit,93, Section 79
[95] Op Cit,93, Section 80
[96] Op Cit,93, Section 81

The Constitution of Kenya, 2010

The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of the government.[97] The Judiciary is established under chapter ten of the Constitution. Judicial authority is to be exercised by courts and tribunals established under the Constitution.[98] In exercising judicial authority, the courts and tribunals shall be guided by the following principles: Justice shall be done to all, irrespective of status; justice shall not be delayed; promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms; justice shall be administered without undue regard to procedural technicalities; and the promotion and protection of the purpose and principles of the Constitution.[99]

Independence of the Judiciary and security of tenure of the judges are guaranteed under Article 160. In exercise of judicial authority, the Judiciary shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.[100]

There is established the office of the Chief Justice who is the head of the Judiciary and the president of the Supreme Court.[101]

The Constitution defines the system of courts.[102] The superior courts are the Supreme Court, the Court of Appeal, the High Court and courts to be established by Parliament with the status of the High Court to hear and determine disputes related to employment and labour relations and the environment and the use and occupation of, and title to, land. The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of the President.[103] It is provided that a presidential election petition shall be heard and determined within fourteen (14) days of filing of the petition and the decision of the Supreme Court shall be final.[104]

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[97] Article 2 of the Constitution of Kenya, 2010
[98] The Constitution of Kenya, 2010, Article 159(1)
[99] Op Cit,98, Article 159(2)
[100] Op Cit,98, Article 160(1)
[101] Op Cit,98, Article 161(2)
[102] Op Cit,98, Article 162
[103] Op Cit,98, Article 163 (a)
[104] Op Cit,98, Article 140

Article 105 gives jurisdiction to the High Court to hear and determine election petitions challenging membership to Parliament. The petition should be heard and determined within 6 months of the date of lodging the petition.[105]

The subordinate courts comprise the Magistrates Courts, Kadhis Courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament.[106]

The Constitution has created the Judicial Service Commission whose function is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.[107]

The Commission has been established and has so far recruited 28 judges of the High Court and 7 judges of the Supreme Court, including the Chief Justice and the deputy. The Commission has, for the first time, conducted public recruitment of judges.[108]

The judges' tenure of office is secured. They cannot be removed from office except on the recommendation of a tribunal appointed by the President. The procedure of their removal is defined under the Constitution.[109]

The Judicature Act

The Judicature Act makes provision for the jurisdiction of the High Court, Court of Appeal and subordinate courts. The provision on jurisdiction is now superseded by the provisions of Article 2 of the Constitution of Kenya, 2010, on supremacy of the Constitution and Article 159 on the judicial authority of the courts.

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[105] Op Cit,98, Article 105 (2)
[106] Op Cit,98, Article 169
[107] Op Cit,98, Article 171
[108] Abdullahi, A., 'Restoring Public Confidence in Kenya's Discredited, Corrupt, Inefficient and Overburdened Judiciary: The Judicial Service Commission Agenda for Reform', a paper presented at the Law Society of Kenya Annual Conference, August 2011, Mombasa. Mr. Abdullahi is a member of the Judicial Service Commission.
[109] The Constitution of Kenya, 2010, Article 168

Section 7 limits the number of puisne judges of the High Court of Kenya to seventy and those of the Court of Appeal to fourteen. This provision poses a challenge to institutional capacity reforms in the Judiciary. The Judicial Service Commission has, through the office of the Attorney General, initiated the process of amending the Act to remove the ceiling on the number of judges in the High Court and the Court of Appeal.[110]

Judicial Service Act

The Judicial Service Act makes provision with respect to judicial services and administration of the Judiciary; membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff, and regulation of the Judiciary fund and of the establishment, powers and functions of the National Council on the Administration of Justice.[111]

The Act provides a legal framework for addressing some of the existing institutional challenges of the Judiciary, like inadequate number of judges and magistrates, corruption and incompetence of judicial staff.

The importance of the Act can be summed up in the words of Ahmednasir Abdullahi when he said:

> 'The Act and the Constitution play pivotal roles in addressing both the historic failures of the Judiciary and chart a progressive path forward in terms of accountability, efficiency and people centered institution.'[112]

The Supreme Court Act

This is an Act of Parliament to make further provision with respect to the operation of the Supreme Court pursuant to Article 163(9) of the Constitution.[113]

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[110] Speech by the Deputy Chief Justice, Lady Justice Nancy Barasa, During the unveiling of the Judiciary Transformation Steering Committee at the Supreme Court, Boardroom, Nairobi, Reported by Paul Juma, www.allafrica.com (Accessed 6th October 2011)

[111] The Judicial Service Act, Act No.1 of 2011,(Laws of Kenya)Short Title

[112] Op Cit,108

[113] Act No. 7 of 2011(Laws of Kenya)

The Court has exclusive jurisdiction to determine disputes arising out of presidential elections pursuant to Article 163 of the Constitution. The application is by way of petition and has to comply with procedures to be prescribed by rules under the Act.[114] The rules are yet to be prescribed.

The Vetting of Judges and Magistrates Act

The Vetting of Judges and Magistrates Act[115] provides for the vetting of judges and magistrates and the establishment of powers and functions of the Judges and Magistrates Vetting Board.[116]

The Board is to be guided by the principles and standards of judicial independence, natural justice and international best practice in execution of its mandate.[117] The mandate of the Board is to vet judges and magistrates who were in office as at 27th August 2010, the effective date of the Constitution of Kenya, 2010.[118] The purpose of the vetting is to determine the suitability of such judges and magistrates to continue holding office.

2.4.3 Overview

The national framework governing the procedure and institutional framework for determination of election petitions is broad.

The Constitution promotes the independence and capacity of the Judiciary to deliver justice.

It creates the Supreme Court with jurisdiction to handle presidential elections exclusively and within defined timelines. It also provides for a timeline of 6 months for determination of parliamentary election petitions by the High Court.

The National Assembly and Presidential Elections Act and the Elections Offences Act have been repealed by the Elections Act of 2011.

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[114] ibid., Section 12 (Rules not yet in place)
[115] Act No. 2 of 2011(laws of Kenya),
[116] Op Cit,115, Section 3
[117] Op Cit,115, Section 5
[118] Op Cit,115, Section 13 as read together with Schedule 6, Section 23, of the Constitution of Kenya, 2010

The Elections Act provides only two alternative modes of service: personal or advertisement in the daily newspaper.

The Vetting of Judges and Magistrates Act provides an opportunity to remove corrupt and unethical judicial officers.

The Judicial Service Act establishes the governance structure of the Judiciary with check mechanism.

2.5 Conclusion

There exists an elaborate legal framework on elections and election dispute resolution at the international, regional and national level. This framework provides principles and procedures for dealing with the process of resolving disputes at the various levels. At the national level, there is a system of institutions for processing such disputes.

CHAPTER THREE: A CRITIQUE OF THE LEGAL AND INSTITUTIONAL FRAMEWORK AND THE PROCEDURES AND PRACTICES

3.1 Introduction

As noted in Chapter 2, independent courts and tribunals are the preferred framework for resolution of election disputes. The international, regional and national frameworks emphasise the importance of elections and the need to resolve disputes arising thereof timely and efficiently. The framework recognises fundamental rights of the citizens in elections which are enforceable through election petitions.

The dominant category of election petitions discussed in the present context is that arising out of parliamentary elections. Presidential elections, too, warrant consideration, and are considered within this broader context. Petitions relative to the Local Governments Act are not considered.

There are factors that prevent timely, cost-effective and merit-based disposal of election petitions. These are gaps in the law, institutional (judicial, that is) inadequacies and, lastly, counterproductive (and often uncompromising) fidelity to technicalities of procedure.

3.2 Gaps in the law

Until the enactment of the Elections Act, the only substantive legislation on election petitions was the National Assembly and Presidential Elections Act (the NAPEA) under which the National Assembly Elections (Election Petition) Rules are made. The courts have held that the two are a complete regime and the procedure prescribed should be strictly followed.[119]

This study examines gaps in the law in respect of service upon the respondents to a petition, the effect of notice of appointment and instructions of advocate, the necessary parties in an election petition, and mandatory timeframes for conclusion of election petitions and the principle of overriding objective applied in civil litigation.

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[119] See, The Speaker of the National Assembly vs. The Hon. James Njenga Karume, Civil Application No. 92 of 1992 and Kimani Wanyoike vs. Electoral Commission of Kenya, Civil Application No. 213 of 1995 (Unreported)

3.2.1 Service of election petition upon the respondents

This dimension in election petitions has always produced controversy. A lot of time, this aspect has had two components. The first has been the modes of service. The second has been the document to be served upon the respondent by the petitioner. However, a combination of both components has produced a third component, being conflict in the law (the NAPEA and the Rules) which, in turn, bears upon the time frames for the service of process.

The NAPEA had provided for filing and service of the election petition within twenty-eight (28) days after the publication in the Kenya Gazette (the Gazette) of the results of the election. That section did not, however, prescribe the mode of service, whereas the Rules provided for other alternative modes of service.[120] The provision presented an immense challenge and it was a manifest gap in the NAPEA. Litigation and the resultant jurisprudence greatly diminished access to justice. Confronted with this challenge, the Court of Appeal held that into that gap personal service ought to be read.[121] The Court, while holding that Parliament had not specifically dispensed with the need for personal service, premised its conclusion on the importance of election petitions to the parties concerned and the public generally.

The Court held that:

> 'The only mode of service under Rule 14 (1), if the rule still applied under Section 20 (1) (a), was personal service. As such service had not been effected, indeed there was no suggestion that personal service was attempted and repulsed, the petition was a nullity.'[122]

The principle was upheld in the *Abu Chiaba case* where Justice Khaminwa held that substituted service through the Kenya Gazette was proper having been done after diligent efforts to serve personally failed. On appeal, the Court of Appeal upheld the decision of the High Court.[123]

In 2007, the NAPEA was amended to reflect the foregoing court's position to the effect that where, after due diligence, it is not possible to effect personal service, the presentation may be

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[120] National Assembly Election (Election Petition) Rules, Rule 14 (2)
[121] Mwai Kibaki vs. Daniel Toroitich Arap Moi (2008) 2 KLR, page 351
[122] ibid
[123] Abu Chiaba Mohammed vs. Mohammed Bakari and others, Civil Appeal No. 238 of 2003 (unreported)

effected by its publication in the Gazette and in one English and Kiswahili daily newspaper with the highest national circulation in each case.[124]

Apparently the amendment did not cure the problem as the issue of service still arose in the election petitions filed in 2008. Data collected on parliamentary election petitions filed following the 2007 general elections reveals that there were forty (40) Parliamentary election petitions filed in 2008.[125]

The data is analyzed, in terms of, the period taken to determine the election petitions, and whether the petition was determined on technicality or merit, withdrawn or countermanded pursuant to death of elected candidate, as follows:

Year	Determined on merit	Determined on technicality	Withdrawn	Countermanded on death of elected candidate	Pending
2008	-	21	2	1	16
2009	2	-	1	-	13
2010	9	-	-	-	4
2011	2	-	-	-	2
2012	None	-	-	-	2
Totals	13	21	3	1	2

The data revealed that most of the election petitions have in the past been determined on technicality. On inquiry on the nature of technicality, it was established that defective service was the main reason for the premature termination of election petitions.

The courts were faced with arguments as to what constituted diligent efforts to serve personally. In the election petition challenging the election of Langata Constituency Member of Parliament,

[124] Legal Notice No. 7 of 2007, Section 20 (1) (iv)
[125] Data obtained from the Nairobi Central High Court Registry and the Independent Electoral and Boundaries Commission Directorate of Legal Affairs(As at 31st January 2012)

Justice Visram held that attempts to serve the Respondent over the weekend and after six in the evening did not constitute diligent efforts to serve personally.[126]

The exercise of alternative mode of service in the Kenya Gazette was held unacceptable. In another election petition challenging the election of the Member of Parliament of Dujis Constituency,[127] Justice Visram held that dropping off court documents at the gate of the respondent's house or leaving them with his security guards cannot possibly constitute personal service. It would appear that the Judge was following Justice Ibrahim's decision in election petition with respect to Member of Parliament for Kuria Constituency, where in dismissing the election petition, the Judge held that personal service is physical service and must be attempted before exercising the option of publishing in the newspapers and the Gazette.[128] A total of twenty one (21) election petitions filed in 2008 were dismissed for want of service.

In 2009, an observer wrote that:

> 'Currently, election petitions now largely revolve around service with the onus being on the petitioner to prove that there was proper service, that is, personal service. In the event of lack of personal service, the petitioner must prove that he did all he could to serve the petition upon the respondent. The effect has been that respondents now seriously contest any demonstration by the petitioner that the petition was properly served and thus demeaning election petitions to be rarely determined on the substance of the case but on procedural questions of whether the petition is properly before the court. The result of interpreting Section 20 (1) of the National Assembly and Presidential Elections Act in this manner has been disastrous to say the least. It is likely that voters may have suffered misrepresentation in Parliament to the above interpretation of the provisions of the law.'[129]

The upshot of it all, is that, with the applications taken out for striking out election petitions for want of service, determination of election petitions on their merits usually got unconsciously delayed or defeated altogether. The delays are worsened by the ever present appeals to the Court of Appeal against the Orders of the High Court.

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[126] Stanley Livondo vs Raila Odinga and others, Nairobi, High Court, Election Petition No. 27 of 2008(unreported)
[127] Nasir Mohammed Dolal vs Duale Aden Bare, Nairobi, High Court Election Petition No. 28 of 2008(Unreported)
[128] Mwita Wilson Maroa vs. Gisuka Machage and Others, Kisii High Court, Election Petition No. 5 of 2008 (Unreported)
[129] Op Cit, 46, page13

It is for these reasons that the Elections Act, 2011, is laudable for having prescribed clear modes of service.[130] Only two modes of service have been prescribed, personal service or advertisement in a newspaper with national circulation.[131] The Act places the two modes of service at the same level; one could serve by advertisement without at first trying in vain to serve such respondent in person. The author predicts further litigation on the provision if rules on the details of the advertisement are not prescribed like the size of the advert and its contents. One could always argue that the advert was too small and hidden in the classified advertisements or did not give adequate details of the petition.

3.2.2 Notice of appointment and of instructions: Ought they to bear upon considerations of service?

A gap in the law persists even under the Elections Act, with respect to the appearance by the respondent in an election petition by way of notice of appointment and instruction of an advocate. Justice Warsame reckoned in the Dickson Karaba case[132] that entry of appearance in civil proceedings by a respondent or defendant is understood as waiving technical irregularities on service. In civil practice, on filing a notice of appointment and `instruction of advocate, such party would, in turn, be understood to be accepting the jurisdiction of the courts to determine the cause of action on merit or substance. Moreover, such entry into appearance is regarded in practice to be unconditional. [133]

The stream of thought is that in the present context, the filing of notice of appointment of an advocate would create an unqualified presumption in favour of a petitioner, that a valid service of the petition upon the respondents had been effected. Access to justice in the context of election petitions would be substantially improved by having rules akin to civil practice with regard to notice of appointment and instruction of advocate

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[130] Act No. 24 of 2011 (Laws of Kenya), Section 77 (2)
[131] ibid
[132] Dickson Daniel Karaba vs. John Ngata Kariuki & 2 Others, Nyeri High Court, Election Petition No. 1 of 2008 (Unreported)
[133] ibid

3.2.3 Parties to election petitions: Which are they that are necessary for effective determination of election petitions?

The NAPEA, the Rules and the Election Act do not define the necessary parties in an election petition. Case law indicates that far-reaching and widespread litigation has arisen in this context of service and the joinder of unnecessary parties.[134] As those cases show, it may be that an application is made to strike out a petition on the basis that proper service upon an otherwise unnecessary party was not achieved. Litigation focused on the desire, usually by some respondents, to have certain other respondents removed from the proceedings because they are unnecessary or because there are no allegations made against them in the election petition.

Consequently, there has now arisen a class of players in the electoral process who, save for special circumstances, it would not be necessary to join as respondents in election petitions. For, even where they have, for example, not been properly served, their presence or absence as respondents would affect neither the substance nor the outcome of any particular election petition.

An example of such party would be the returning officer who acts for and serves the electoral body at constituency level. The returning officer would not be a necessary party to the effectual and complete determination of an election petition. The scenario changes where and when allegations are made against the returning officer. In the past the Chairman, the Returning Officer and, in some cases, the Presiding Officers and members of the electoral body would be enjoined as respondents. The unnecessary parties are, as the four examples above show, agents and or servants of the electoral body. They work under the direction and coordination of the electoral body. This, the High Court reckons, is especially true of the Returning Officers.[135]

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[134] Examples include the following cases: Dickson Karaba vs. John Ngata Kariuki and 2 Others (Election Petition no. 1 of 2008) (unreported) (Per Warsame J.) ; James Nyamweya vs. Cosmos Oluoch and 4 Others (Election Petition No. 74 of 1993) (unreported); Jane Kihara vs. Christopher Anjele and 2 Others (Election Petition No. 2 of 2008) (unreported) and Jonesmus Kikuyu vs. Jonathan Munyalo and 5 Others (Election Petition No. 75 of 1993) (unreported)

[135] Dickson Karaba vs. John Ngata Kariuki and 2 Others (Election Petition no. 1 of 2008) (unreported) (Per Warsame J.)

The electoral body has the constitutional and statutory responsibility to conduct free and fair elections. Towards that end, it is empowered to employ servants and agents to assist to carrying out the mandate. Such servants and agents would be unnecessary parties for two reasons. Firstly, the cause of action and the proceedings would be principally against the elected candidate and the electoral body. Secondly, the principle of vicarious liability and considerations of the principles relative to the principal-agent relationship render the concerned electoral body responsible for the faults of its officers.

In relation to the Returning Officer, the High Court has expressed itself in the Dickson Karaba case thus:

> 'Applying the principles of vicarious liability and of the principal-agent, the 3rd Respondent is likely to be responsible for the negligence, want of care and failure to conduct and conclude free and fair elections unless there is evidence that the malpractices alleged by the Petitioner, was for the benefit of the Returning Officer.'[136]

The holding would logically apply with respect to all agents and servants of the electoral body. A sound conclusion can be drawn from the foregoing that the elected candidate and the electoral body are the necessary parties.

Agents and servants of the electoral body, on the other hand, are unnecessary parties unless an allegation is made against such a party that would affect the results of the election. The case again of *Dickson Karaba vs. John Ngata Kariuki and 2 Others*[137] illustrates this point well. The Petitioner had been among the candidates that vied for the Kirinyaga Central Parliamentary seat. The Second Respondent, one James Kariuki Gitahi, had been the Returning Officer. Forty days after the proceedings had commenced, the Second Respondent took out a Notice of Motion, seeking an order to strike out the election petition for want of service upon him.

Justice Warsame, on the bench with Justice Kasango, disagreed on the ground that the Second Respondent was not a party necessary for the effectual and complete determination of that cause. The Judges reasoned that being an agent and servant of the Third Respondent (the now defunct

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[136] ibid
[137] Op Cit, 135

Electoral Commission of Kenya), the Second Respondent's presence or absence would, and could, not affect the substance and outcome of the election petition. Secondly, the Judge reasoned that failure at personal service being an irregularity, could be waived by the unconditional entry of appearance through the filing of notice of appointment of advocate.

It was concluded that having filed a notice of appointment, and having made the application forty days late, the Second Respondent had waived the irregularity of service and, therefore, accepted the jurisdiction of the court to determine the election petition on its substantive merits.[138]

The case of *Jonesmus Mwanza Kikuyu vs. Jonathan Munyalo and 5 others*[139] makes an intriguing conclusion. The petitioner had lost to the Sixth Respondent. The First Respondent had been the Returning Officer at the election. The Second, Third, Fourth and Fifth Respondents were the now defunct Electoral Commission of Kenya, its Chairman, the Director of Elections and a Member (a Commissioner) respectively. The First, Second, Third, Fourth and Fifth Respondents sought to have the petition struck out for want of service. Further, they sought the striking out of the Second, Third, Fourth and Fifth Respondents from the petition for being erroneously enjoined to the petition contrary, as they argued, to the law and practice.
The facts relative to service were that the petitioner had served process only upon the Fourth Respondent (the then Electoral Commission of Kenya Director of Elections) Neither personal nor substituted service had been placed upon the First, Second, Third and Fifth Respondents. The Respondents argued that this was failure to comply with rules governing the service of election petitions.[140]

The Court, however, came to some rather intriguing conclusions upon these issues. Firstly, it observed that the inclusion alone of the electoral body (the then Electoral Commission of Kenya) or the inclusion of more than one respondent is academic. Secondly, a decision was made to strike out the Returning Officer (the First Respondent herein). This, it has been reported, was to *'streamline and crystallize the parties and the issues'*.[141]

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[138] Op Cit, 135
[139] Election Petition No. 75 of 1993(Unreported)
[140] ibid
[141] Kivuitu,S,M., A Digest of Important Unreported Election Petitions Cases, 1993 to 1999, page 37

A conclusion upon the foregoing can be made. First, the High Court has recognized the necessary parties but because the decision of High Court Judge is not binding on fellow Judges the matter is not settled. Only the Court of Appeal can bind the High Court under the doctrine of *stare decisis*. If the statute had provisions on the necessary parties in an election petition, certain dynamics of interlocutory litigation would never arise.

3.2.4 Mandatory timeframes for the conclusion of the election petitions

The NAPEA had provided, merely, that election petitions would be heard on a priority basis.[142] This presented a challenge as the pace at which the election petition would proceed depended greatly not on the law, but on the administrative efficacy of the election court. The election court was not entirely dedicated to the petition and the presiding judge would also attend to other civil and criminal cases as listed in the daily cause list.[143] The Elections Act has now adopted an obligatory timeframe of six months for hearing and determination of election petitions that arise in the context of County elections.[144] The Constitution, has fixed the timeframe for hearing and determination of parliamentary election petitions at six months.[145] The mandatory legal provisions on time frame will be an impetus towards timely and cost-effective determination of election petitions. The gap in the law on mandatory timeframes has been addressed.

[142] Chapter 7 (Laws of Kenya), Section 19 (4)
[143] Final Report of the Task Force on Judicial Reforms, chaired by Justice William Ouko, July 2010, Nairobi: Government Printer: 51
[144] Act No. 24 of 2011 (Laws of Kenya), Section 75 (2)
[145] The Constitution of Kenya, 2010, Article 105(2)

With respect to the presidential election petitions, the Constitution has provided for a mandatory timeline of fourteen (14) days to hear and determine the election petition. While this is a positive provision, persons interviewed opined that the time frame was not practical considering the dynamics of election petitions which may include calling of witnesses from different Counties and even recount and scrutiny of ballot documents. It was said to be a recipe for technical failure and political chaos. It was proposed that a timeline of three months would be more reasonable and practical to ensure fair hearing.

3.2.5 The overriding objective in civil litigation

The NAPEA does not have provision akin to the '*overriding objective*' provision of the Civil Procedure Act.[146] The Elections Act also lacks such a provision. The overriding objective of the Civil Procedure Act is meant to facilitate the just, expeditious, proportionate and affordable resolution of disputes.[147] The court shall in exercise of its powers under the Acts or in the interpretation of any of their provisions, seek to give effect to the overriding objective:

> 'For the purposes of furthering the overriding objective, the court shall handle all matters presented before it to achieve the just determination of the proceedings; the efficient use of the available administrative resources; the timely disposal of proceedings before the court at a cost affordable by the respective parties and the use of suitable technology.'[148]

The benefits of these provisions cannot be gainsaid, for such provisions, would fill in the gaps that are left in statutes by lawmakers. Examples of gaps that can be addressed by these provisions would be in the area of extension of time to comply with the provision on deposit of security for costs, filing of witness statements and filing of appeals. The overriding objective can also be applied to allow the petitioner to amend the pleadings in the petition.

Some of the 2008 election petitions have highlighted this dilemma. The election petition of *Esposito Franco vs. Amason Jeffah Kingi and 2 others*[149] is one of them. In this case, the petitioner had lost his bid for the Magarini Constituency's Parliamentary seat. The petitioner

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[146] Chapter 21 (Laws of Kenya)
[147] Op Cit, 146, Section 1A
[148] Op Cit, 146 ,Section 1B
[149] Malindi High Court, Election Petition No. 1 of 2008, Election Petitions Digest Vol. 2, 2010, International Commission of Jurists (Kenya Section), page 34

sought to nullify the election of the First Respondent, the Member of Parliament, on a number of grounds. Among the grounds, the petitioner said that the election was marred by violence that affected the tallying of votes and the results. The petitioner requested for scrutiny and recount of votes and a declaration by the election court that the election was invalid.[150]

The petitioner did not meet the timeline under the NAPEA of three days after filing of the election petition, for deposit of security for costs.[151] The petitioner applied for extension of time to deposit in court the security for costs. The application was brought under the NAPEA and Sections 3 and 3A of the Civil Procedure Act. Of the latter the sections invoked contain the overriding objective provision and the inherent jurisdiction of the court to make orders in furtherance of the ends of justice and prevent abuse of the processes of the court.

The Court declared that it lacked jurisdiction to extend the time as prayed for and that the NAPEA and the Rules were a complete code. Therefore, the components of different statutes could not be brought into litigation upon election petitions.

> 'The National Assembly and the Presidential Elections Act inclusive of its support subsidiary legislation is a comprehensive code of substantive and procedural election law and hence the Civil Procedure Act and the rules made thereunder do not apply to the National Assembly and Presidential Elections Act except where expressly provided for in the Act or the Rules made thereunder.'[152]

The Court came to the conclusion that Sections 3 and 3A of the Civil Procedure Act was inapplicable in election petitions and hence the application failed. The election court stated:

> 'Hence the application of extension of time, which is germane to the Civil Procedure Act and Rules, is inapplicable under the National Assembly and Presidential elections Act. Section 21 is worded in peremptory language. It does not admit ambiguity or further search for the intention of Parliament. Failure to deposit the security within 3 days is not a mere irregularity. It goes to the root of the matter. I find and hold that this court lacks jurisdiction, under the National Assembly and Presidential Elections Act, to extend time within which to deposit security for costs.'[153]

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[150] ibid
[151] Chapter 7 (laws of Kenya), Section 21
[152] James Nyamweya vs. Cosmos Oluoch, Election Petition No.74 of 1993 (unreported)
[153] ibid

The application for extension of time was dismissed leading to technical defeat of the election petition.

The Court of Appeal (Omolo, Bosire and O'Kubasu JJA), in another case[154] has ruled that election courts and the Court of Appeal have no jurisdiction to allow a petitioner to amend his pleadings after the mandatory period of 28 days allowed for lodging election petitions has lapsed.

Further the Court of Appeal, Githinji Nyamu & Visram JJA, in *Maina Kamanda vs Margaret Wanjiku Kariuki and 2 Others,*[155] held that election courts and the court of Appeal lack the jurisdiction to permit, through extension of time, a respondent in an election petition to lodge an appeal upon an interlocutory ruling of the election court outside the mandatory 30 days statutory window provided under the NAPEA.[156] In this case, the Respondent was only one day late.

Strangely, the Court of Appeal in another related case, allowed an application for the extension of time within which to file a Notice of Appeal. Applying Rule 4, of the Court of Appeal Rules, on extension of time, Bosire JA, held:

> 'the delay itself is so short that a denial of an extension of time will not be in the interests of justice.....considering the nature of the litigation relates to Parliamentary elections... in the circumstances as those disclosed in this application, the short delay of one day is not inordinate and is excusable.'[157]

The inconsistencies in the decisions of the Court of Appeal indicate the necessity of election petition law to have provisions akin to the overriding objective as defined in sections 1A and 1B of the Civil Procedure Act. The existing situation, which has not been rectified under the Elections Act, leaves litigants in election petitions to the rescue of individual progressive judges of the Court that are mindful not to limit access to justice.

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[154] John Mututho and Jayne Kihara & Others, Civil Appeal 102 of 2008, Elections Digest Vol.2, International Commission of Jurists- Kenya Section, 2010, page 66
[155] Civil Appeal No.221 of 2008 (unreported)
[156] Chapter 7 (laws of Kenya), Section 23(4)
[157] Dickson Karaba vs. John Ngata Kariuki & 2 Others, Civil Appeal (Application) No. 125 of 2008 (unreported)

The gap in the law exposes litigants in election petitions to diminished opportunities of access to fair determination of election petitions.

3.3 Deposit of security for costs

The NAPEA had provided for payment of security for costs of Kshs. 250,000.00 within 3 days of filing the election petition. The Elections Act prescribes a substantial increase in security for costs from two hundred and fifty Kenya shillings to one million in case of a petition challenging the presidential elections, five hundred thousand shillings in the case of election petition challenging an election of a Member of Parliament or a County Governor. Security for costs has been introduced in the sum of Kenya shillings one hundred thousand with respect to petitions challenging the election of members of the County Assembly. The time for making the deposit has been increased to 10 days from 3 days after filing of the petition. The 10-day window period for making the deposit was said to be inadequate. Most of the respondents said a 30-day window period was reasonable.

It was suggested that the requirement for the security for costs should be flexible to allow deposit of title documents as security for costs.

On the increased security for costs under the Elections Act, the response to the question was that the costs are prohibitive and unconstitutional and was seen as selfish and meant for self-preservation by Members of Parliament. Oddly, the electoral body was of a different view, that, the increased cost would assist in doing away with frivolous claims. Further some of the interviewees were of the view that increased security for costs in presidential election petition was necessary for the stability of the country as it is likely there will be few petitions filed resulting to quicker determination of the petitions by the Supreme Court.[158]

From the response on the requirement for deposit of security for costs, the majority view is that the prescribed costs under the Elections Act are prohibitive and will impede access to justice. This position is supported by the Commission for Implementation of the Constitution. The

[158] Op Cit, 48 to 51

Commission believes that changes to the Act introduced in Parliament and others by Government Printer have made the Act unconstitutional.[159]

The Commission is concerned by some of the provisions of the Act that limit constitutional rights without justification as well as wordings that water down otherwise clear-cut provisions of the Constitution. Such unconstitutional provisions in relation to elections and election petitions as stated in the Commission's third quarterly report[160] are Section 39, which introduces a provision that the electoral body can announce provisional results before receipt of final results, an option which is excluded by Article 86 of the Constitution and Section 80 which requires deposit of security of cost in election petitions[161] in contravention of the provisions of Article 48 on access to justice as the costs prescribed in the Act are too high.

3.4 Institutional inadequacies

The NAPEA provided that the election court on Parliamentary election petitions consisted of one judge. This was a challenge as a single judge can easily be compromised or be seen to be compromised. When faced with such accusation, many of the judges opt to disqualify themselves leading to delay in the determination of the election petitions.

The 2008 Kamukunji Constituency Parliamentary election petition[162] is a case study on the capacity of a single judge bench to handle election petitions. The case was heard by three separate judges at various stages: Justices Rawal, Ochieng and Ang'awa. Justice Rawal disqualified herself in the middle of the proceedings on the ground that she had received a threatening text message on her cell phone. The Judge alleged that the message came from the respondent, the incumbent Member of Parliament, who denied the allegation.

No investigation report was submitted to substantiate the claim. Justice Ochieng took over but before making any substantial progress in the petition, disqualified himself on the ground that the

[159] Commission on the Implementation of the Constitution, Third Quarterly Report, July- September 2011, available at www.cickenya.org (accessed 31st October, 2011)
[160] ibid., annex v
[161] ibid
[162] Ibrahim Ahmed vs. Simon Mbugua and 2 Others, Nairobi High Court, Election Petition No. 41 of 2008

Petitioner had made comments doubting his credibility. Justice Ang'awa finally took over the matter to conclusion.[163] This case illustrates the point that one judge is likely to be intimidated or compromised in an election petition. Political factors like the tribe of the judge[164] and prevailing politics may contribute to lack of confidence in a judge but this is unlikely scenario in a three judge bench. The Elections Act is silent on the number of judges constituting an election court. This is positive as the Judiciary can freely decide on the best way to constitute the election court.

Another institutional inadequacy is the random transfer of judges handling election petitions. In the election petition challenging the election of the Member of Parliament for Matuga Constituency,[165] Justice Sergon had commenced the hearing of the petition and the petitioner's case closed when he was transferred. Justice Ibrahim took over to hear the respondent's case. This is not proper practice as the Judge taking over has to rely on the proceedings as recorded without having the benefit of hearing the witnesses and observe their demeanor.

Transfer of judges in the midst of hearing the petition also causes delay in the determination. An example is the case of Matuga Constituency where Justice Sergon had made substantial progress in the hearing by October, 2008 when he was transferred and the judgment was issued by Justice Ibrahim on 5th January 2010.

Inordinate delay appears to be a main weakness of the Judiciary when it comes to election petitions. In *Moses Ole Sakuda vs George Saitoti and 2 others*[166], the petition was filed on the 21st January, 2008 and withdrawn on the 14th July 2009. The Petitioner explained that the subsistence of the petition before the court was causing unnecessary partisan politics in Kajiado North Constituency hindering development, causing conflicts and disagreements among the constituents. The petitioner noted that the situation was affecting the making and implementation of various beneficial policy decisions.[167]

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[163] ibid., See court proceedings
[164] In Reuben Ndolo vs Dickson Wathika, Nairobi High Court, Election Petition No.11 of 2008, Justice Wendoh was persuaded to disqualify herself from hearing the Petition after it was alleged she was related to the petitioner and one of the Respondent's advocates by marriage
[165] Ayuma Mwakesi vs. Mwakwere Chirau Ali & 2 Others, Mombasa High Court, Election Petition No. 1 of 2008 (unreported)
[166] Nairobi High Court, Election Petition No. 14 of 2008 (unreported)
[167] ibid

The election petition of *John Koyi Waluke vs. Moses Wetangula and 2 others*[168] is a classic example of inordinate delay. The petition was filed in January 2008. The Petitioner in a letter dated 4th November 2009 complained of inordinate delays and intentional frustration of the trial process in regard to his petition as follows: The first Judge, Hon. Karanja was replaced on the 14th January 2009 by Hon. Justice Msagha who was also replaced on the 3rd February 2009 by Hon. Justice Ochieng. According to the allegations in the letter, several months passed before the Petition could be heard because Hon. Justice Ochieng withdrew from hearing the petition because of a conflict of interest having been classmates with the 1st Respondent. Hon. Justice Muchemi was subsequently appointed. Further, Justice Muchemi was sitting in two stations, Busia and Bungoma, hence delaying the hearing of the petition even further.[169] The petition was still pending for hearing as at 31st January 2012.

Statutory limits on the jurisdiction of the courts and the Court of Appeal precedents is a weakness which hinders the capacity of the election court to render adequate justice. A good example is the issue of extension of time to file security for costs, to serve or even to amend the pleadings in election petitions and the Kibaki vs. Moi precedent on personal service.

The administrative arrangements of the Judiciary of allocating judges appointed in the election court other matters in the daily cause list impedes expeditious disposal of the election petitions.[170]

The Court of Appeal circuit system of sitting causes delay in final determination of appeals arising from interlocutory rulings by the election court as the matters have to be fitted in the court's diary.[171] In most cases, stay of the hearing of the election petition is granted pending hearing of appeal.

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[168] Bungoma H.C., Election Petition No. 1 of 2008
[169] International Commission of Jurists (Kenya Section)., Compendium of 2007 Election Petitions: Emerging Jurisprudence, 2010, page 210
[170] Op Cit, 143
[171] ibid

Corruption is another weakness of the Judiciary which the institution admits.[172]An observer recently wrote:

> 'Corruption in the Judiciary is not just an issue of mere perception, as some members of the Judiciary want us to believe. It is real, widespread and a symptom of a very entrenched culture. There is so far no evidence that the vetting process and the new Constitution has forced members of the Judiciary to either reduce the incidents of corruption or completely stop the practise of the vice.'[173]

Separation of powers between the Judiciary and the Executive has in the past been compromised. The impact of this came to the fore in 2008 when the Orange Democratic Movement (ODM) political party declared that they would not file an election petition to challenge President Kibaki's win. A publication by a group of several civil society led by the Constitution and Reform Education Consortium (CRECO) states:

> 'The ODM reasoned that Kibaki (sic) had over time appointed many judges to the High Court and the Court of Appeal following the rather controversial purge[174] on KANU-era judges, to the extent that the impartiality of Kenya's Judiciary was deemed questionable. The fact that the previous election petitions on presidential elections had not been concluded satisfactory was used to support the ODM's argument.'[175]

Lastly, on physical access, data collected found that the court buildings all over the country are not user-friendly for the physically challenged persons. Only Milimani law courts in Nairobi has lifts but the same are not fitted with voice directions to guide the blind. This impedes access to a minority category of Kenyan citizens and the Judiciary needs to address the issue. Under Article 54 of the Constitution, persons with disability are entitled to reasonable access to all places and to be treated with dignity. The Judiciary fails on this score.

Further, there only 17 High Court stations serving the 47 counties, majority of which are based in the main towns. Many of the citizens residing in the rural areas and especially in the arid and semi-arid areas have to travel long distance to access the High Court. In North Eastern province, with three (3) vast counties, there is only one High Court station based in Garissa County. Due to the cost involved, many citizens do not enjoy the services offered by the high court jurisdiction.

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[172] Op Cit,143

[173] Op Cit,108

[174] This was done in 2003 by a task force committee headed by Justice Ringera (retired) which recommended the removal of several judges and magistrates on the basis of unethical conduct and poor performance.

[175] Constitution and Reform Education Consortium., Political Thuggery, the State of Kenya Elections 2007 Report: A verdict, 2008, Nairobi: Myner Logistics, page 25

In conclusion, it can be said that some of the institutional inadequacies are attributable to gaps in the law and others are attributable to the manner of recruitment of judges, professional incompetence, lack of confidence in the election court, inadequate resources, corruption and influence by the other arms of the government, especially the executive.

3.5 Cost of election petitions

Other than security for costs deposited in the court, data collected indicates that the costs awarded after conclusion of the petitions filed in 2008 are too high compared to previous years and will in the future deter potential litigants for fear of being declared bankrupt and or related consequence. In the Election Petition for *Matuga Constituency*[176] the court awarded costs to the Member of Parliament despite having lost the petition in the sum of Kshs. 24 million and to the petitioner Kshs. 24 million all payable by the electoral commission. The Respondent was awarded Kshs. 4 million payable by the petitioner. In *Juja Constituency*[177] Election Petition, the court awarded Kshs. 28,851,539.00 to the petitioner and Kshs. 28,444,008.00 to the Member of Parliament, the 1st respondent, despite having lost the petition. The trend in these two cases is suspect for two reasons. The first is the fact that costs were awarded to the losers without justification and contrary to the principle that costs follow the event. Secondly, the costs awarded were unprecedented and way above the prescribed fees in the Advocates Remuneration Order. These awards have created persuasive precedents to apply in future litigation and advocates are likely to base their fees on the same. Access to justice in the circumstances will be a preserve of the rich.

3.6 Summary of findings

It has emerged that over time, progressive jurisprudence has arisen to fill the various gaps in the law. The Elections Act, 2011, has come at an opportune time to end the long controversy about the service of election petitions by providing for only two modes of service. The gaps that had been there in the NAPEA coupled with various institutional inadequacies encouraged undue

[176] Ayub Mwakesi vs Mwakwere Ali & 2 Others, Mombasa, Election Petition no. 1 of 2008
[177] William Kabogo vs George Thuo & 2 Others, Nairobi High Court, Election Petition No. 10 of 2008

adherence to technical procedural rules. There ought to a specific timeframe for determining all election petitions, including those relative to the National Assembly. This has been addressed by the timeframes provided under the Constitution of Kenya, 2010 and the Elections Act.

It has been found that whether or not election petitions will ever be disposed of justly, expeditiously and cost-effectively is up to various players. These are the Judiciary, the executive, the legislature and the public. For, it is litigants who thrive on the gaps in the law to frustrate progress, in each case, of election petitions. Yet, it is the Judiciary that, being obligated by non-progressive legislation and an overbearing executive and corruptible public, permits the litigants to stall election petition and defeat even clear-cut cases.

The Judiciary's buildings were found not to be user-friendly to the persons with disability. This is in breach of the Constitution which provides the right of access to all places by persons with disability and that they must be treated with dignity and respect. Further, the High Court stations are few and unevenly distributed. The long distance impedes access to the High Court by majority of Kenyans living in the rural areas.

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

Whereas the context herein is strictly Kenyan, it has been noted that certain universally acknowledged standards exist in relation to judicial electoral dispute resolution. These standards are, therefore, not only comparative, but also the best practices. Article 2 of the Constitution, provides that the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the applicable law. The international law will address the gaps in the national law.

The national framework under the repealed National Assembly and Presidential Elections Act was inadequate for failing to prescribe with certainty the modes of service, and for lacking mandatory timeframes. These two factors have contributed immensely to technical litigation around the issue of service and caused delay in final determination of the petitions. The Elections Act and the Constitution are laudable for prescribing mandatory timeframes and clear modes of service. The only problem is that the law does not prescribe the sanction for failure to serve.

There are positive developments in the law under the Constitution and the 2011 Elections Act, Judicial Service Act, Supreme Court Act and the Vetting of Judges and Magistrates Act. Under Section 23 of the Sixth Schedule to the Constitution, the former Constitution is applicable only in the transition period, that is, before the holding of the next general elections.

The Constitution promotes the independence and capacity of the Judiciary to deliver justice. The creation of the Supreme Court's jurisdiction to handle presidential elections exclusively and within defined timelines will contribute to increased confidence in the Judiciary. The constitutional provision on a timeline of 6 months in determination of parliamentary election petitions will compel the courts to put in mechanisms for timely determination of such election petitions. The provision for access to justice under the bill of rights is a positive development as it will enhance access to courts by requiring that, if any fee is required, it shall be reasonable and shall not impede access to justice. The vetting of judges and magistrates under the Vetting of

Judges and Magistrates Act will improve the credibility of the courts in the eyes of members of the public and, especially, the political parties, voters and politicians with respect to election disputes. The Judicial Service Act is laudable for establishing a governance structure of the judiciary with check mechanism.

It has been established that the Judiciary's capacity to handle election petitions is inadequate. The current practise of appointing a single judge to sit in an election petition is unsuitable. The single member bench is prone to intimidation and manipulation.

There is inordinate delay in final conclusion of election petitions leading to lack of confidence in the Judiciary as the final arbiter. The average time taken to conclude election petitions on merit is three years.

The doctrine of *stare decisis* impedes the capacity of the election court to render adequate justice. This is more so where the judges are supposed to exercise their discretion to grant orders necessary for efficient determination of the case.

Corruption is another weakness of the Judiciary of which the institution at least admits in various reports. Separation of powers between the Judiciary and the Executive has in the past been compromised. There is now clear separation of powers between the three arms of government under the Constitution.

The Judiciary's buildings are not user-friendly to persons with disability. This impedes access to a category of the Kenyan citizens. The High Court stations are few and unevenly distributed across the country, impeding access by majority of Kenyans living in the rural areas.

The historical gaps in the law related to service of process and lack of timelines under the repealed National Assembly and Presidential Elections Act have now been addressed by the Elections Act of 2011.

Other gaps in the law still exist under the Elections Act being, the lack of overriding objective of civil litigation; undefined players in the electoral process who are the authentic parties necessary

for the complete and effectual determination of election petitions; the extension of time to allow petitioners to pay security for costs in election petitions; the extension of time to allow the petitioner to amend pleadings outside the mandatory 28-day period allowed by statute and the authority of the election courts and the Court of Appeal to allow appeals upon interlocutory matters after the 30-day statutory period has lapsed.

Elections petitions are very expensive. The most important expense which has the capacity to lock out many potential litigants is the mandatory requirement on deposit of security for costs. The sums payable as security of costs deposit under the Elections Act of 2011 have been revised upwards by huge margins. This is unconstitutional as access to justice is now recognised under the bill of rights and fees payable should not impede access to courts.

4.2 Recommendations

1. The hierarchy of the courts: The doctrine of *Stare Decisis*. A mechanism ought to be designed toward the harmonisation of divergent views expressed by the superior courts of record upon certain technical components of election petition litigation.

2. Necessary parties: There are those players in the electoral process that could become necessary to the complete and effectual determination of election petitions. Statute should declare who they are. This would prevent unnecessary litigation in the context of service, for example, upon unnecessary parties.

3. The overriding objective of civil litigation: A provision similar to the contents of Sections 1A and 1B of the Civil Procedure Act ought to be written into the Elections Act.

4. Payment into court of deposit of security for costs: The requirement for deposit of security for costs should be abolished. If still considered necessary, like in the case of presidential election petitions, payment should be made flexible to allow deposit of other forms of security like title documents. The prescribed security for costs in the Elections Act of 2011 is prohibitive and ought to be reviewed downwards.

5. Appeals upon interlocutory matters ought to be prohibited. Any aggrieved party should wait for the conclusion of the petition to appeal. This will curb delay tactics used by some of the parties and, especially, the elected candidates. This will also enable the courts comply with the prescribed timelines.

6. A provision be introduced in the Elections Act of 2011 to the effect that, once a respondent in an election petition has filed a notice of appointment and instruction of an advocate, the same shall be taken as a waiver of technical irregularities on service and acceptance of the court's jurisdiction to determine the cause on its merits.

7. Special election court: election petitions and the laws and rules of procedure related thereto are, in sum, a complex and specialised sphere. As such, it is recommended that there should be a division in the Judiciary dedicated to election petitions. This will enable some of the judges to specialize on election petitions for enrichment of jurisprudence in the area.

8. Court of Appeal: the court should be decentralised to several stations in the country as the circuit system delays the determination of appeals arising from interlocutory applications in election petitions.

9. There ought to be a body composed of judges (of the Court of Appeal, the High Court and the Supreme Court of Kenya), Advocates, the Chief Registrar of the Judiciary and representatives of critical bodies that are key stakeholders. This body would be charged with constantly proposing amendments that match progressive jurisprudence from election petitions. It is hoped, at best, that such a body would be robust, working in tandem with an otherwise vibrant election Court and the election disputes tribunal established under the electoral body.

10. Application of the general rules of international law: the Elections Act should be amended to borrow from international law best practices on election disputes. This is in, especially, the area of ensuring timely and cost-effective decisions.

11. Physical access: the Judiciary buildings should be modified to provide user-friendly facilities for the physically challenged to enable them access all courts. The Judiciary ought to establish High Court stations in the 47 counties to reduce the distance and effectively serve justice to all persons living in the various parts of Kenya.

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APPENDIX

QUESTIONAIRRE Serial No.....

ACCESS TO JUSTICE: CASE STUDY OF THE LEGAL AND INSTITUTIONAL FRAMEWORK, PROCEDURES AND PRACTICE IN RELATION TO ELECTION PETITIONS IN KENYA

1. Objective

The objective of this questionnaire is to obtain pertinent information on access to justice in the context of election petitions in Kenya. The information collected will be used for academic purposes only.

2. Introduction

1. Name of the Institution/Organization..... .....

2. Occupation of the interviewee.....

3. Objectives:

I. Legal and Institutional Framework

a) Comment on the adequacy of the existing legal framework on election petitions.....
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.....
.....

b) Are there any weaknesses in the laws governing election petitions?.....

c) If answer to (b) above is yes, please list the weaknesses of the legal framework
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.....
.....

d) Is the institutional (Judiciary) framework as stipulated in the Constitution, Judicature Act, The Judicial Service Commission Act, The Supreme Court and the Vetting of Judges and Magistrates Act adequate?.....
.....

.....
.....

e) Suggest any necessary reforms on the laws governing on the election petitions.....
.....
.....

II Procedures and practice in relation to election petitions

(i) Procedures

a) Comment on the procedures for filing election petitions.....
.....
.....
.....

b) Comment on the requirement for filing costs.....
.....
.....
.....
.....
.....

c) Is the security for costs necessary in elections petitions?(Yes/No).....
State why (if answer is yes.....
.....

d) What do you think of the increased of security for costs in the Elections Act, 2011.....
.....
.....

(ii) Practice

a) Comment on the time taken to determine election petitions?
.....
.....
.....
.....

b) What do you think is the appropriate timeline for determination of election petitions?.....
.....
.....

c) What are the challenges faced by the petitioner in election petitions?.....
.....
.....
.....

d) What are the challenges faced by the elected candidate in election petitions?.....
.....
.....

e) What are the challenges faced by the electoral body in election petitions?.....
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.....
.....

f) What are the reasons for dismissal of election petitions at interlocutory stage?.....
.....
.....

g) Are judges immune to political influence and capable of making independent impartial decisions in election petitions?.....
.....
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.....

h) Comment on the capacity of judges dealing with elections petitions in terms of competence.....
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.....

i) In your opinion what contributes to delay in determination of election petitions.....
.....
.....

j) Comment on physical access to High Courts in the Country in terms of distance and facilities for the disabled persons.....
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.....
.....

THANK YOU FOR TAKING TIME TO FILL THIS QUESTIONAIRRE