



## Dispute Resolution and Electoral Justice in Africa: The Way Forward

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### Abstract

This article examines electoral adjudication in Africa's democratisation process. The idea of aggrieved persons instituting an election petition in court as opposed to resorting to violence is a positive sign in Africa's democratisation process. The aggrieved are choosing the law as their arbiter. This practice will facilitate the institutionalisation of succession and entrench the rule of law and constitutionalism. However, there have been misgivings about the outcome of judicial adjudication of some of these electoral disputes. Electoral disputes are not always resolved expeditiously and courts' decisions on such matters are sometimes overtaken by events. There is also the perception of judicial bias in some cases. In the same way the large numbers of election petitions put a lot of strain on the judiciary, clogging up the courts. Voter education on realistic expectations of elections by citizens should be intensified so that an election ends with the ballot and only genuine cases go through adjudication.

**Keywords:** election adjudication, election disputes in Africa, electoral justice, election petitions, electoral integrity, and alternate election dispute resolution

### Résumé

Le présent article examine l'arbitrage électoral dans le processus de démocratisation en Afrique. L'idée que des personnes lésées introduisent une pétition électorale devant un tribunal au lieu de recourir à la violence est un signe positif dans le processus de démocratisation en Afrique. Les lésés choisissent la justice comme leur arbitre, une pratique qui facilitera l'institutionnalisation de l'alternance et renforcera la primauté du droit et du constitutionalisme. Cependant, il y a eu des doutes quant à l'issue de l'arbitrage judiciaire de ces différends électoraux. Les différends électoraux ne se règlent pas rapidement et les décisions des tribunaux sur ces questions sont parfois dépassées par les événements. Il y a en outre la perception d'une partialité judiciaire. De la même manière, le grand nombre de pétitions électorales met beaucoup de pression sur le pouvoir judiciaire, engorgeant ainsi les tribunaux. L'éducation des électeurs sur les attentes réalistes

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des citoyens concernant les élections devrait être intensifiée afin que les scrutins se terminent sur le verdict des urnes et que seuls les cas dûment fondés passent par l'arbitrage.

**Mots-clés:** arbitrage électoral, litiges électoraux en Afrique, justice électorale, pétitions électorales, intégrité électorale, et règlement alternatif de litiges électoraux

## Introduction

Since the 1990s, African states have committed themselves to the institutionalisation of democratic governance individually and collectively through regional and continental inter-governmental bodies. One of the institutional cores of democracy which is generally accepted as basic to all forms of democracy is periodic elections often regulated by law. Thirty-one out of the forty-one countries in Africa which had hitherto not held elections did so between 1990 and 1994. As at 2007, there had been multi-party elections in 45 out of the 48 countries in sub-Saharan Africa (Brown & Kaiser 2007). More countries have since embraced multi-party political systems. Increasingly, mono-party and military regimes which plagued the continent are becoming obsolete (Segal 1996).

The problem, however, is that these elections were reportedly tainted with flaws and irregularities undermining the credibility of the outcome. There have been complaints of bloated voter registers, over-voting and tampering of election figures among others (Omotola 2010). There have been cases where losers and their affiliates have rejected the election outcome at any stage in the voting process or at the declaration of the results. Non-acceptance is being registered in several ways ranging from protest, outrage, and demonstrations like the naked-breast women's demonstration by elderly women of Nigeria and a sex strike in Kenya (Ajayi 2010) to the perpetration of violence which sometimes leads to civil conflicts. Others are resorting to existing electoral justice mechanisms for remedy such as the courts or alternate dispute resolution. Disputes may arise at any stage in the electoral process. The effective resolution of disputes emanating from the electoral process is critical to electoral integrity. The importance of electoral dispute resolution is captured by the Chief Justice of Ghana when she said:

In our contemporary world, in a representative democracy, the timeliness with which a judiciary decisively determines electoral disputes without fear or favour, affection or ill-will, is part of the package of mirrors through which civilised societies view a people. We, the judiciary in Ghana, recognise that we have a major contribution to make to ensure that our country is seen in the best possible light and given the highest regard globally (2012:2).

The electoral laws of several African countries make room for dispute resolution of complaints and appeals that emanate from any aspect of the electoral process through various mechanisms, namely the courts, administrative bodies and alternative dispute resolution bodies (Fall et al. 2011). Among these, judicial adjudication is considered critical in ensuring electoral justice. By judicial adjudication reference is being made to 'The legal process of resolving a dispute. The formal giving or pronouncement of a judgement or decree in a court proceeding, which also includes the judgement or decision given... It implies a hearing by a court, after notice, of legal evidence of the factual issue(s) involved.' (International Institute for Democracy and Electoral Assistance (2010:35). The AU's Principles Governing Democratic Elections in Africa, 2002, provides that a critical component of democratic elections is the presence of an independent judiciary to adjudicate issues emanating from the process. In Ghana, Kenya, Côte d'Ivoire, Zimbabwe, Nigeria, and Uganda and many others, electoral disputes were handled by the courts with varying outcomes. Even in advanced democracies there has been electoral adjudication in places like the United States, United Kingdom and Germany (*Bush v. Gore*, 531 US 98 2000; International Institute for Democracy and Electoral Assistance 2010b).

The role of the judiciary is critical in safeguarding the ongoing democratisation in Africa by ensuring credibility in the adjudication of electoral disputes. However, there have been misgivings about the outcome of judicial adjudication of these electoral disputes, leading to lack of confidence in the process (Abuya n.d.; Fall et al. 2011). Also, electoral adjudication is not being studied. As Davis-Roberts pointed out: 'Electoral Dispute Resolution mechanisms have not received the same amount of analysis and attention that other aspects of the electoral process, such as voter registration, have' (2009:3). In the contexts of Africa, literature on it is scarce. It is imperative that electoral adjudication in Africa is studied. Against this background, the paper examines judicial adjudication of electoral disputes during the second wave of Africa's democratisation which started from the beginning of the 1990s.

It should be observed that electoral adjudication occurs where the judiciary of a given country is invoked to decide on an issue involving the elections of that country as opposed to formal or informal alternate dispute resolution mechanisms. Judicial adjudication may be invoked at any stage of the electoral processes. In this sense there could be pre-voting adjudication where the courts are invoked to decide on matters emanating from any aspect of the pre-voting processes such as the qualification of a candidate, problems with voter registers etc. before the polls or voting. There could also be post-voting adjudication where voting is done, counting and tallying may be done

or ongoing, results may have been declared or not, or declared winners may have assumed positions as the case may be and the court is invoked to challenge the election outcome. The challenge could be on any aspect of the electoral process but the main goal of the claim is to have the entire process annulled or modified by the court, or a demand is made for a recount. The basis of the claim may relate to any aspect of the electoral process which is considered to have affected the process and the outcome negatively.

### **Methodology**

The article is anchored in the interdisciplinary legal paradigm. The interdisciplinary legal analysis is the exact fit for the study under consideration, which is meant to provide an understanding of the use of the courts. Purely legal doctrinal analysis alone will not suffice as it will not exhaust the domain for the examination and analysis for such a study. It will be woefully limited in terms of content and context in that the study requires expansive sources of data in order to obtain the contexts and dynamics of electoral adjudication in Africa. The study utilized available data including electoral laws of countries, documents, mass media and social science data archives. Two advantages of using available data are that there is no reactivity of measurement and also cost effectiveness.

### **The Concept of Electoral Justice**

Concepts on electoral dispute resolution have emerged, one of which is electoral justice which forms the conceptual basis of the study. The International Institute for Democracy and Electoral Assistance (IDEA 2010) conceived electoral justice as the means, measures and mechanisms which have been inserted into an electoral system to prevent the occurrence of irregularities and for that matter electoral dispute or to mitigate them or to resolve them and punish perpetrators when they do occur. An electoral justice system involves the means and mechanisms for ensuring that 1) 'each action, procedure and decision related to the electoral process is in line with the law (the constitution, statute law, international instruments, and all other provisions)', 2) 'and also for protecting or restoring the enjoyment of electoral rights' and 3) 'giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive adjudication' (IDEA 2010a:1).

An Electoral Justice System which the ACE Encyclopaedia refers to as an electoral dispute resolution system consists 'of appeals through which every electoral action or procedure can be legally challenged... such a system aims at ensuring regular and completely legal elections. Legal elections depend on legal corrections of any mistake or unlawful electoral action' (ACE 2012:113). This may be categorised into formal systems whose decisions

are corrective of irregularities, or those that are punitive and whose decisions lead to the punishment of offenders, or also alternate dispute resolution mechanisms that parties to an electoral dispute may resort to for amicable settlement of disputes. An electoral justice mechanism may be a constitutional court, a branch of mainstream courts, specialised electoral courts or administrative court (IDEA 2010a).

An electoral justice system aims to ‘prevent and identify irregularities in elections and to provide the means and mechanisms to correct those irregularities and to punish the perpetrator’ (IDEA 2010b:5). It is at the cornerstone of democracy in that it safeguards both ‘the fundamental role in the continual process of democratisation and catalyses the transition from the use of violence as a means for resolving political conflicts to the use of lawful means to arrive at a fair solution’ (IDEA 2010a:III).

Even though an electoral justice system is informed and shaped by the history, politics, law and cultures of a given country, an electoral justice system also needs to conform or adhere to certain principles in order to be efficient and effective. These principles are integrity, participation, lawfulness (rule of law), impartiality, professionalism, independence, transparency, timeliness, non-violence and acceptance (IDEA 2010a). The electoral justice principles are meant to lead to procedurally-correct elections and obedience of citizens’ electoral rights. The electoral justice principle was affirmed by the Supreme Court of Ghana as per Adinyira (Mrs) JSC in *Addo Dankwa Akuffo Addo & 2 Others v. John Dramani and Others* (2013).

Electoral justice is anchored in legal frameworks at the national, regional and international levels as a right. The constitutions of African countries provide for the right to vote and to be voted for as well as the right of redress for electoral complaints which statutes and case law uphold. The Protocol on Democracy and Good Governance adopted by the Economic Community of West African States (ECOWAS Protocol) in 2002 mandates among other things that ‘the principles to be declared as constitutional principles shared by all Member States’ is that ‘Every accession to power must be made through free, fair and transparent elections’ (Article 1 (b)). Article 4 of the AU Declaration on Principles Governing Democratic Elections in Africa adopted in Durban South Africa (‘the Declaration’) in July 2002 gives the bench mark for democratic elections namely, that it should be conducted fairly, under democratic constitutions and in compliance with supportive legal instruments, under a system of separation of powers that ensures in particular the independence of the judiciary at regular intervals in accordance with national constitutions, by impartial, all-inclusive competent and accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.

One of the measures that State parties are to undertake to ensure democratic election is through electoral adjudication. The Declaration by Article III(c) requires State parties to ‘... establish competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections to ensure democratic elections’. Article IV (13) provides that ‘every citizen and political party shall accept the result of elections as conducted in accordance with law’, and ‘accordingly respect the final decision of the competent electoral authorities’. Those who are dissatisfied with the result can ‘challenge the result appropriately according to law’.

The African Charter on Democracy, Elections and Governance (‘the Charter’) (2007) requires State Parties to ‘establish and strengthen national mechanisms that redress election-related disputes in a timely manner’. Article 17(4) of the Charter requires State parties to put a binding code of ethics in place which shall ‘include a commitment by political stakeholders to accept the results of the election or challenge them... through exclusively legal channels’. At the UN-level electoral dispute resolution is not specifically provided for but is inherent in the respective framework on dispute resolution like the International Covenant on Civil and Political Rights (European Union 2007), hence it creates international legal obligation.

### **The Judiciary in Electoral Adjudication**

As indicated, adjudication is one of the mechanisms for electoral justice. The role of the judiciary in election adjudication is summed up into two main functions by Siri Gloppen (2007:2) in his discussion of the role of Ugandan courts in election as: 1) resolving disputes over rules; ensuring that the rules create ‘*a level playing field* – they are *rule-evaluating*’. By this, they make sure that the rules governing the conduct of elections are in consonance with the higher norms and principles of the constitution. The second function of the courts is for ‘*securing fair play* – they are *rule-enforcing*’ (Gloppen 2007:3). In this sense they act as referees of the election competition and decide complaints of violence to redress irregularities and even cancel where they deem it necessary to do so. These are part of the mandates of courts in constitutional democracies in judicial review. Other auxiliary functions of courts Siri Gloppen identified in electoral adjudication are that they serve as a campaign arena where the parties continue with the contest to win political points. They also serve as a safety valve for the losers to cool off their frustration, anger and loss because of the possibility of succeeding in court.

The question that has arisen regarding judicial review generally is that it is anti-majoritarian, in that a few individuals sitting as judges can decide to throw out a decision taken by the generality of the people directly or through

their representatives' officials. In the contexts of electoral adjudication which is a review of the whole legal architecture and practice on election, the concern has been that the resolution of electoral disputes by the judiciary may lead to contrary results from what the people may have decided through the polls. In view of this, it is argued that electoral disputes should be resolved by an agency within the legislature because they are political in nature; judicial involvement in electoral disputes brings it to the arena of political contests and diminishes its legitimacy (Choper 2001).

In the context of Africa, this question becomes relevant; namely, whether the judiciary should continue to exercise reviews of election laws and practice, or whether the legislature of the executive arm of government is well suited for that function. It may be helpful to revisit the debates on judicial review that took place in the early stages of the American Republic in Kentucky State for insight on the matter. The Kentucky judicial review saga evokes the argument under consideration as to where the ultimate decision making should be posited in a body polity; whether with the judiciary or of the legislature. The Supreme Court of the United States of America in *Marbury and Madison* in 1803 had assumed the powers of judicial review – the power to assess the constitutional validity of statutes or law made by parliament. In 1820 the Supreme Court of Kentucky in a decision abolished a popular debt relief statute. The legislature of Kentucky, displeased with the Court's decision, passed a law to abolish the court and replaced it with another court with a limited review authority. The legislature argued that the final authority to interpret the constitution was with the people and their legislative agents but never with the judges. The judges would not only become kings, but despots and dictators if they were to have the final authority. Proponents of judicial review also argued that the legislature as it were did not constitute the people, but representatives of the people in the faculty of making laws. Thus the legislature could also betray the people. And when they did so an independent judiciary should prevail to 'preserve the 'higher-law structure of society'. The debates dominated electoral discourse for three successive elections until the people of Kentucky finally voted in favour of judicial review (Ruger 2004).

In the contexts of Africa, where electoral disputes are concerned, the judiciary is well suited to serve as neutral arbiter other than the other two arms of government. This is because the judicial officers are not elected but are appointed with security of tenure unlike the officials of the other arms of government who are reconstituted periodically. Again, the disputes being complained of emanate from elections in which the other branches had been the main actors and are the disputants, as it were. As regards the issue of judicial decision being anti-majoritarian, it should be observed that an

election process may be flawed to an extent that the declared results may not be the views expressed by the polls and it may take judicial intervention to set the records straight and to institute the majority view.

## **The Legal Regime of Electoral Adjudication in Africa**

### *Electoral Adjudication Systems*

The laws of African countries make room for electoral rights; the right to vote and be voted for and also the right to lodge a complaint to redress violations that may occur (Articles 106 and 117 of the Constitution of Benin; Article 219 of the 1999 constitution of Cape Verde; Section 285 (1) of 1999 Constitution of Nigeria and the Electoral Act of Nigeria, 2006; Articles L43, L44, R28 and R35 of the Electoral Code of Senegal; Section 45(2)(a-b) and Section 78 Constitution of Sierra Leone 1991 and Electoral Laws Act, 2002 of Sierra Leone (as amended); Article 21(1) of the Constitution of Tanzania).

Judicial adjudication forms part of the electoral dispute resolution architecture in Africa. In this sense the courts are empowered to hear electoral disputes either as a court of first instance or in an appellate capacity on appeal from an administrative body as the case may be. The courts may be mainstream courts like that of Ghana or specialised courts like election tribunals as pertains in Nigeria. It could be heard by a high court or their constitutional court which could also be the supreme court in some cases (Fall et al. 2011).

The adjudication of dispute in most Southern African Development Community (SADC) countries is through the High Court. Countries like Angola, Botswana, Lesotho, Madagascar, Namibia, Swaziland, Zambia, and Zanzibar etc. have the High Court as the body responsible for the adjudication of election disputes. With regards to the countries which have the High Court as an adjudicatory body in common, the period for which a writ needs to be filed to the High Court is 30 days (Electoral Institute for Sustainable Democracy in Africa 2010). Also, other countries like Angola and Seychelles have the Constitutional Court as the main adjudicatory body for electoral disputes. However, some countries like Uganda and Mozambique have the National Electoral Commission (NEC) as the body responsible for the adjudication of electoral disputes, but on appeal such matters are sent to the Constitutional Court (EISA 2010).

In West Africa, the bodies responsible for the adjudication of electoral dispute in most countries are the Constitutional Courts. The Constitutional Court could also be deemed as the Supreme Court. Countries such as Benin, Cape Verde, and Sierra Leone have the Constitutional Court as the body responsible for the adjudication of electoral disputes. However, countries



such as Nigeria and Senegal have other adjudicatory bodies for resolving electoral disputes. If the bodies do not provide satisfactory results to the parties involved in the electoral dispute they can then appeal to the Constitutional or Supreme Court. For example, in Nigeria the main body responsible for the adjudication of electoral disputes is the election tribunals but appeal lies to the court (Fall et al. 2011).

This notwithstanding, the laws on electoral adjudication are in some cases inadequate. Okello (2009) reported that the laws on elections in Uganda are inadequate. He complained that there were no laws on absentee balloting, early voting of polling officials or security officials who are deployed on election day. The Supreme Court of Ghana as per Dotse JSC advocated for the need for further laws on election in Ghana (*Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (Churchill) v. Attorney-General & Electoral Commission (Consolidated)* 2008).

Some of the laws are clumsy, and the interpretation by the courts conflicting (Kiggundu 2006). In Benin, for example, the Constitutional Court declares the provisional results of elections and after it has heard and resolved electoral disputes issues declares the final results. This creates a situation that may require that it adjudicates over its own decision (Fall et al. 2011). The management of electoral dispute in the Republic of Benin is one of the difficulties faced in the chain of electoral management. This is because the sharing of responsibilities amongst the electoral dispute adjudicators is not very clear (Fall et al. 2011).

### ***Limited Court Jurisdiction***

The jurisdiction of the courts in electoral matters is limited in some countries. In Ghana, the High Court has the jurisdiction to hear cases concerning the validity of election of a Member of Parliament by virtue of Article 99 (1) of the 1992 Constitution of Ghana. Article 99(2) of the Constitution further provided that 'A person aggrieved by the determination of the High Court... may appeal to the Court of Appeal'. The Supreme Court of Ghana has held in the case of *In Re Parliamentary Election for Wulensi Constituency: Zakaria v. Nyimakan* (2003-2004) that the import of the said Article 99(2) is that an appeal against the decision of the High court on the validity of the election of Members of Parliament ends at the Appeal Court and cannot go beyond to the Supreme Court of Ghana. Within the contexts of parliamentary election petition, the right of appeal ends at the Court of Appeal. Consequently, Article 13 1(1) of the 1992 Constitution which provides for the right of appeal from the judgement of the Appeal Court to the Supreme Court in respect of criminal and civil matters does not apply to the Appeal Court's decisions on parliamentary election. This is a denial of the constitutional

right of the aggrieved to have their grievances pursued up to the highest court of the land.

In Zimbabwe, for example, any appeal from the Electoral Court to an appellate court can only be on the grounds of law and not on facts (Section 172(2) of the Electoral Act of Zimbabwe 2005). In Tanzania, the results of presidential elections cannot be challenged by law, but that of a parliamentary election can be challenged (EISA 2010). The Constitution of the United Republic of Tanzania (The Union Constitution), the constitution for Tanzania Mainland and Tanzania Zanzibar in Article 74(12) ousts the jurisdiction of the court from entertaining 'anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this constitution'. This notwithstanding, the Court of Appeal of Tanzania held in *Attorney-General and Two Others v. Aman Walid Kabourou* that:

The High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission (quoted in Makaramba 2011:14).

Also, Article 41(7) of the Union Constitution ousted the jurisdiction of the High Court from entertaining any matter on presidential elections once the results are declared by the National Electoral Commission. In *Augustine Lyantonga Mrema and Others v. Attorney-General* (1996) the petitioners prayed the Court to nullify the presidential election due to a nationwide misconduct that characterised the election. The Court upheld the constitutional provision that once the results of a presidential election were declared, the jurisdiction of the court was ousted. In the Kaborou case (1996), the former Chief Justice of Tanzania decried the situation and hoped for constitutional amendment. The matter was laid to rest in *Attorney-General and Christopher Mtikila* (cited in Makaramba 2011).

Also, the Union Constitution provides that candidates can contest for presidential, parliamentary and local government elections when they belong to a political party and are nominated and sponsored by a political party. Consequently, the Constitution prevents independent candidates from contesting elections. The issue of the independent candidates was also a subject matter of contention in *Attorney-General and Christopher Mtikila* where the Court of Appeal of Uganda held:

In our case, we say that the issue of independent candidates has to be settled by Parliament which has the jurisdiction to amend the Constitution and not the Courts which, as we have found, do not have that jurisdiction. The decision on whether or not to introduce independent candidates depends on the social needs of each State based on its historical reality. Thus the issue of independent candidates is political and not legal (quoted in Makaramba 2011:16).

Commenting on the Mtikila case cited above, Hon. Justice Robert V. Makaramba opined that the decision has settled the issue as to whether or not election matters are political to be settled in court or by the Parliament. The question of independent candidates is political which the court would leave for the legislature to handle. Critics of this case maintained that the Court of Appeal of Tanzania abdicated its responsibility to administer justice. Makaramba thought that the position of the Court reversed the progressive position of the court in *Christopher Mtikila v. Attorney-General*. The conflicting interpretations and position by the courts call for a clarity in the law by a clear unambiguous definite law on the jurisdiction of the courts and other matters on election disputes in Tanzania.

### ***Inadequacy, Clumsiness and Uncertainty of Electoral Laws***

The laws on electoral adjudication are in some cases inadequate. Okello (2009) reported that the laws on elections in Uganda are inadequate. He complained that there were no laws on absentee balloting, early voting of polling officials or security officials who are deployed on election day. The Supreme Court of Ghana as per Dotse JSC advocated for the need for further laws on election in Ghana (*Ahumah-Ocansey v. Electoral Commission; Centre for Human Rights & Civil Liberties (Churchill) v. Attorney-General & Electoral Commission (Consolidated)* 2008).

Some of the laws are clumsy, and the interpretation by the courts conflicting (Kiggundu 2006). In Benin, for example, the Constitutional Court declares the provisional results of elections and after it has heard and resolved electoral disputes issues declares the final results. This creates a situation that may require that it adjudicates over its own decision (Fall et al. 2011). The management of electoral dispute in the Republic of Benin is one of the difficulties faced in the chain of electoral management. This is because the sharing of responsibilities amongst the electoral dispute adjudicators is not very clear (Fall et al. 2011).

There is the issue of uncertainty of electoral laws. In Kenya, there is uncertainty with regard to the timeframe for the commencement of an election petition other than presidential elections. Article 87(1) of the Kenyan constitution provided that election petition should be lodged within 28 days from the declaration of the results by the Independent Electoral and Boundaries Commission (IEBC). The Election Act, however, provided in section 76 (1) (a) that election petition to challenge the validity of election should be filed within 28 days of the publication of the results in the gazette. Section 77(1) of the Election Act further provides that an election petition other than for a presidential election is to be filed within 28 days of the declaration of the results by the Commission (Ongoya 2013). From the relevant statutory provisions, the timeline within which the complaint on elections could be

filed is 28 days. The problem has to do with when the counting of the 28 days starts. There are two timelines: the declaration of the results and the other is from the publication of the results in the gazette. Since the constitution is the Supreme law of Kenya, the constitution frame of 28 days within the declaration of the results should have prevailed on the matter. However, the law on the timeframe for lodging elections has been subjected to conflicting interpretations by the Kenyan High Court. Whereas some High Courts have upheld the validity of Section 76 (1) (a) that is an election petition should be filed within 28 days of the publication of the results in the gazette (*Ferdinand Waititu v. IEBC and Others*; *Josiah Taraiya Kipelian Ole Kores v. David Ole Nkediye and Others*; *Caroline Mwelu Mwandiku v. Patrick Mweu Musimba & 2 Others*), others held the section unconstitutional and that a complaint should be made within 28 days of the declaration of the results and not the publication of the results.

In Uganda there is uncertainty about electoral laws. It seems that for each election period new rules are enacted to guide the elections and the electoral process begins with the amendment and enactment of electoral laws and regulations which will govern those elections. This situation poses a problem because 'late enactment and/or amendment of enabling laws leaves the Commission with inadequate time to organise, to conduct, and supervise elections including activities that have legal time requirements' (Okello 2009:8). This has a resultant effect where 'organising and conducting election within a short timeframe does not give the various stakeholders adequate time to internalise the requirements for participation in elections' (Okello 2009:8). Badru M. Kiggundu, the Chairman of the Uganda Electoral Commission decried this situation when he observed:

Uganda faces a chronic problem of late enactment of electoral laws....This leaves room to several mistakes. Some of the requirements of the electoral laws are impracticable. For instance, the current regime of electoral laws requires that all public servants wishing to contest for membership of the 8<sup>th</sup> Parliament must have resigned at least three months prior to their nomination. However at the time this law became effective, this three months were no longer available under the Constitution (Kiggundu 2006:6).

The procedure for bringing complaints should be clear and transparent, but this is not always the case. It appears that legal practitioners sometimes are not able to clearly discern the rules on procedure and sometimes the interpretation of procedural rules by the court would not have been clear to complainants or their legal representatives. This is shown in the large number of election cases that border on procedural matters.

The foregoing illustrates the uncertainty and clumsiness of election law and the emerging jurisprudence in some jurisdictions of Africa. The formal and procedural requirements of rule of law demand that law must avoid contradictions and law should be written with reasonable clarity to avoid unfair enforcement. Further laws must stay constant through time to allow the formalization of rules; however, it must allow timely revision when the underlying social and political circumstances have changed (Lon Fuller). Electoral laws should therefore comply with the formal and procedural requirements of law given the complex nature of elections. The courts should ensure that their jurisprudence on electoral laws should lead to fairness, clarity and certainty of electoral laws.

### **The Courts and Election Petitions in Africa**

The courts in Africa during the second wave of Africa's democratisation process have been engaged with electoral issues and have played a critical role in the electoral process. The courts have been inundated with election petitions which the courts consider as a special exercise. It should be noted that election petitions are a special form of petition regarded in law as 'sui generis', that is 'special proceedings of its own kind' and the courts have treated them as such. It is neither criminal nor civil. The Nigerian case of *Obasanya v. Obafemi* (2000:324) defined an election petition as a 'complaint about election or the conduct of election'. They are not regarded as ordinary complaints. In *Orubu v. NEC* (1988) and *Abdulahi v. Elayo* (1993) the Nigerian courts have held that election petitions are not ordinary petitions because of the importance of elections for the wellbeing of democracy. As a result, they should not be subjected to procedural delays, because the rules of procedure in civil cases will not serve its purpose. Similarly, in *Republic v. High Court, Koforidua; Ex parte Asare (Baba Jamal & Other Interested Parties)* (2009, cited in the Judicial Service of Ghana 2012), the Supreme Court of Ghana as per Dotse JSC affirmed that the law has raised 'the procedure for commencement of electoral dispute to a higher pedestal level. This level is that of petition, which is a separate and distinct procedure from generally accepted modes of initiating action in the High Court' (cited in Judicial Service of Ghana 2012:216).

The complaints that make up electoral disputes in Africa vary. In Kenya, for example, there have been disputes concerning the delimitation of electoral area boundaries, political party disputes, nominations, voter registration, campaigns, electoral offences, breaches of electoral code of conduct among others (Ongoya 2013). In Nigeria, for example, there have been complaints on:

voter registration, abuse of power of incumbency for unfair electoral advantage, electioneering campaign, election financing, polling procedures, nomination

process, declaration of results, electoral violence, ballot design, nature of franchise, candidate substitution to ballot, box snatching, ballot box stuffing, inadequacy of polling stations, establishment of illegal polling stations, disappearance of election officials, and the combination of administrative inefficiency, procedural flaws and corruption in the preparation for and in the conduct of elections (Ubanyionwu 2011).

Some complaints were on the delay of the release of election results of election management bodies as occurred in the Zimbabwean case (*Movement of Democratic Change v. The Chairperson of the Zimbabwe Electoral Commission*).

The courts in Africa have delivered judgement on matters intended to correct electoral anomalies and fraud and have even reversed the decision of electoral management bodies (EMB) by cancelling results, ordered reruns, and declared losers as winners and winners as losers. These are mainly in respect of parliamentary and other elections other than presidential elections and there are plenty of examples of such cases. In Nigeria, for example, analysis of 426 of the petitions adjudicated after the 2007 elections in the first instance revealed that 96 of them were upheld and 222 did not succeed due to lack of merit (Ubanyionwu 2011). Likewise in Uganda the court in the first instance upheld some of the election petitions for the 2011 elections which saw some members of parliament losing their seats. Although some of these decisions were overturned on appeal it was considered a very positive development in the Ugandan electoral process (Gloppen 2007).

Concerning petitions on presidential elections the courts have rarely overturned election results as declared by the electoral management bodies (EMB). The courts have generally affirmed the election results as declared by EMBs and ruled in favour of the declared winners who are usually incumbent presidents or their associates. A look at sample cases provided below may offer a detailed insight into petitions on presidential elections in Africa.

### ***Scenarios of Election Petitions***

#### *Kenya*

The Kenyan 2012 presidential election resulted in a dispute before the Kenyan Supreme Court in *Raila Odinga v. The Independent Electoral and Boundaries Commission & Others* (2013). Raila Odinga who had contested and lost the 2013 presidential elections in Kenya instituted an action against the Independent Electoral and Boundaries Commission (IEBC), Ahmed Issack Hassan as a returning Officer of presidential Election, Uhuru Kenyatta as the beneficiary of flawed presidential election as president-elect, and William Samoei Ruto as

the beneficiary of the flawed presidential election as deputy president-elect represented. This case was consolidated with three other cases on the same matter (*Moses Kiarie Kuria & Two Others v. Ahmed Issack Hassan & Another* (PETITION No. 3 of 2013); *Gladwell Wathoni Otieno & Anor v. Ahmed Issack Hassan & Three Others* (PETITION NO. 4 of 2013).

The six particulars of the petitioners' complaint were that: (1) the IEBC had included 'rejected votes in the final tally' which had a 'prejudicial effect on the vote won by Mr. Kenyatta contrary to articles 36(b) and 138 (c) of the Constitution and to Rule 77(1) of the Election (General ) regulations, 2012 (p.4)'; (2) the IEBC failed to 'maintain an accurate voter register that was publicly available, verifiable, and credible' (p.4) as required by law; (3) the 'true number of registered voters is not unknown...' The IEBC 'repeatedly changed the official number of registered voters ...' 'The absence of a credible principal voter register vitiates the validity of the presidential elections' (p.4); (4) the EC adopted a complex electoral system contrary to the Constitution, and 'failed to meet the mandatory legal requirement to electronically transmit election results' (p.5); (5) the IEBC failed to discharge a constitutional duty because the 'tallying and verification of results did not happen at the polling stations' (p.5). There was no electronic device to transmit the provisional results, and party agents were excluded from the National Tallying Centre. The device used for the election 'was poorly designed, implemented and destined to fail. Due to the failure of the system, the first respondent was unable to transmit the results of the elections, in contravention of Regulation 82 of the Election (General) Regulation' (p.6), and (6) the IEBC breached the procurement law by awarding the contract of the election electronic device to an incompetent bidder who procured devices that did not work. Petitioners concluded that the election was fundamentally flawed and not conducted in accordance with law.

Based on the above, the issues for determination by the Court were;

1. Whether the 3<sup>rd</sup> [Uhuru Kenyatta] and 4<sup>th</sup> [William Samoei Ruto] respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the presidential elections held on 4 March 2013;
2. Whether the presidential election held on 4 March 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law (*Raila Odinga v. The Independent Electoral and Boundaries Commission & Others* p.7);
3. What consequential declarations, orders and reliefs this Court should grant, based on the determination of the petition.

In a unanimous decision by the judges, the Court held among other things that the conduct of the election was in accordance with the Constitution and the law, and that Uhuru Kenyatta and William Ruto were validly elected. The court thus upheld the IEBC decision to revert to manual counting when the electronic device broke down. It held that the tallying was done in accordance with the law. The discretion to relocate political agents 'did not undermine the credibility of the tallying' and that would not be the basis for annulling the results. The court also accepted the inclusion of the rejected votes cast as being valid votes cast. The court also held that the voter register was on the whole 'transparent, accurate and verifiable...and served to facilitate the conduct of free fair and transparent elections' (para. 257).

#### *Côte d'Ivoire*

The Côte d'Ivoire 2010 presidential election resulted in a dispute before the Constitutional Council. Gbagbo, whose mandate had expired in 2005, had delayed the election several times. On 28 November 2010 the second round of the presidential election was held. Four days later the Ivorian Election Commission (CEI) declared Alassane Ouattara the winner with 54.1 per cent of the vote. Gbagbo's party complained of fraud and ordered that votes from nine regions be annulled, but the claims were disputed by the Ivorian Electoral Commission and international election observers. The Constitutional Council, in accordance with its legal powers in Article 94 of the Ivorian Constitution, nullified the CEI's declaration based on alleged voting fraud, and excluded votes from nine northern areas. The Constitutional Council concluded that without these votes Gbagbo won with 51 per cent of the remaining vote. The constitutional restriction on presidents serving more than ten years was not addressed. A significant portion of the country's vote was nullified, especially in areas where Ouattara polled well. In 2011, the Constitutional Council President Paul Yao N'Dre said the top legal body now accepted that Ouattara had won the election and proclaimed Alassane Ouattara as President. The Constitutional Council nullified its earlier decision and invited Alassane Ouattara to take an oath in front of an official audience as soon as possible. The court had cancelled more than half a million votes in Ouattara strongholds to declare Gbagbo winner in December, prompting almost universal condemnation from world powers, African leaders and the United Nations. The resulting bloody power struggle between them was only resolved when Ouattara's forces captured Gbagbo (Nkansah 2012).

#### *Ghana*

In Ghana, the result of the 2012 presidential election was challenged. The Electoral Commission declared John Dramani Mahama, the flag bearer of



the National Democratic Congress, as the winner with 50.70 per cent of the votes cast, with Nana Addo Dankwa Akuffo Addo, the flag bearer of the New Patriotic Party (NPP), obtaining 47.74 per cent in *Nana Addo Dankwa Akuffo Addo & 2 Others v. John Dramani and Others* (2013). Akuffo-Addo, his running mate Mahamudu Bawumia, and Jake Obetsebi-Lamptey, the then leader of the NPP instituted an action against John Dramani Mahama, the Electoral Commission, and the National Democratic Congress challenging the result of the 2012 presidential election and the legitimacy of Mahama who had been sworn into office on 7 January 2013 as President of Ghana. Akuffo Addo and the others claimed that the said election was marred with irregularities and the results as declared by the Electoral Commission should be set aside. The particulars or irregularities complained of were:

1. Over-voting
2. Voting without biometric verification;
3. Absence of presiding officers' signatures;
4. Duplicate serial numbers i.e. occurrence of the same serial number of pink sheets for two different polling stations;
5. Duplicate polling station codes i.e. occurrence of different results/ pink sheets for polling stations with the same polling station codes;
6. Unknown polling stations i.e. results recorded for polling stations which were not part of the list of 26,002 polling stations provided by the 2<sup>nd</sup> respondent [Electoral Commission].

Based on the above, the issues before the court were:

1. Whether or not there were statutory violations in the nature of omissions, irregularities, and malpractices in the conduct of the presidential election held on 7 and 8 December 2012 (over-voting, voting without biometric verification, absence of the presiding officer's signature, duplicate serial numbers, duplicate polling station code, and unknown polling stations) and;
2. Whether or not the said statutory violations, if any, affected the results of the election.

On the aforementioned issues the Supreme Court of Ghana unanimously dismissed the claims relating to IV, V, and VI, that is, the issues regarding duplicate serial numbers, duplicate polling station codes, and unknown polling stations. On the other issues, namely I, II, III, on over-voting, voting without biometric verification and the absence of a presiding officer's signature, the Supreme Court in a majority dismissed the claims. The Supreme Court

ruled that 'in the circumstances the overall effect is that the 1<sup>st</sup> respondent was validly elected and the petition is therefore dismissed'.

One of the issues that divided the Supreme Court of Ghana on the case was on the absence of a signature of the presiding officers on the declaration form, otherwise known as the pink sheet. Article 49 (2) of the 1992 Constitution of Ghana provides that the presiding officer after the voting shall count the votes and record the votes cast for each candidate. By Article 49 (3) the presiding officer 'shall sign a declaration stating (a) the polling station and (b) the number of votes cast in favour of each candidate...' and then announce the results at the polling station. The majority as per Atuguba, JSC ruled that the provision in Article 49 (3) should not be interpreted strictly. Rather, the policy objective and the overall purpose of Article 49 (3) was to provide evidence that the results provided on the face of the pink sheet were those once actually generated at the polling station. Apart from the absence of the presiding officer's signature which was only an administrative error or irregularity and not a fundamental defect, all other processes had been duly observed to achieve the purpose. As such an administrative error or irregularity should not be permitted to invalidate the results merely because a constitutional provision is sought to be strictly applied. Once the authenticity of the results remains unquestioned by the petitioners, and indeed unaffected by the absence of the signatures of the presiding officers, those results should not be invalidated. Rather, the presiding officers are liable to be sanctioned.

The minority as per Ansah JSC maintained that it was a mandatory requirement that the presiding officers 'shall' sign the form and by Section 27 of the Interpretation Act of Ghana, 2009, the word 'shall' shall be construed as imperative and 'may' as permissive and empowering. Thus, the framers of the Constitution and the Legislature can be said to have really meant to do serious business when they couched the provisions in Article 49 (3) and Section 36 (2) of C.I. 75 in those mandatory terms; the duty must be obeyed to the letter. The proposition that the word 'shall' connotes a mandatory duty has support in Ghanaian case law. Ansah JSC held that the failure to sign the pink sheets was not only a breach of a mandatory constitutional duty, but also of an entrenched provision of the constitution. It is required that not only the written provisions of the constitution is observed, but its spirit as well, if Ghana is to succeed at her attempt at constitutional democracy. Accordingly, a breach of such a serious nature which casts a slur on the integrity of Ghana's election machinery and as such her democracy should be neither excused nor pardoned. The votes that had been affected by the irregularity should be nullified. The Supreme Court of Ghana made findings on electoral irregularities and recommended the need for electoral reforms on several aspects of the electoral machinery. Akuffo Addo accepted the verdict of the

court and congratulated Mahama as the winner of the elections. The Supreme Court of Ghana's decision was received with mixed sentiments and the idea persists that the decision was against the weight of evidence.

#### *Malawi*

In the presidential election of Malawi in 2014, the President Ms Joyce Banda announced that she was exercising her constitutional powers to nullify the presidential election that she had contested because of irregularities for a fresh election to be conducted in 90 days. The rival had won 40 per cent with 30 per cent votes counted, while Ms Banda placed second with 23 per cent. The head of the Electoral Commission said that the president did not have the power to annul the election and the commission would go on with the counting in spite of the problems associated with it. The High Court rejected the decision of the president.

#### *Uganda*

Museveni was declared the winner of the 2006 presidential elections of Uganda by 59 per cent against Besigye who got 37 per cent. In *Rtd. Cl. Kizza Besigye v. The EC Yoveri Kaguta Museveni* (as reported in Gløppen 2007), Besigye filed a petition on 7 March which was heard from 22-30 March and a decision given on 6 April 2006 within 30 days from the filing of the petition, as required by Article 104 of the Constitution and Section 59 of the Presidential Elections Act. Besigye maintained that Museveni was not validly elected and asked the court to order a re-run or a recount of the vote. The grounds of petition were:

1. That the conduct of the elections contravened provisions of the constitution, Electoral Commission Act and the Presidential Elections Act;
2. Non-compliance with the principles of the Presidential Elections Act affected the results in a substantial manner;
3. Section 59(6)(a) of the Presidential Election Act, which says that an election can be nullified if it is inconsistent with Article 104(1) of the constitution providing that 'any aggrieved candidate can petition the Supreme Court for an order that a candidate was not validly elected';
4. Museveni personally committed electoral offences by making 'malicious, abusive, insulting, misjudging, derogatory and defamatory statements against Besigye, the FDC and other candidates.

The Supreme Court of Uganda found that the Electoral Commission failed to comply with the Presidential Elections Act and the Electoral Commission Act in the conduct of the elections, in that people were disenfranchised; and

in the counting and the tallying of the results. The Supreme Court also found that the election was not conducted on a free and fair basis because of the incidents of intimidation etc. However, the court in a majority of four against three ruled that 'it was not proved to the satisfaction of the court that the failure to comply with the provisions and principles affected the results of the presidential election in a substantial manner' (quoted in Gloppen 2007:16). The claim against Museveni and his agent's impropriety in conduct during the campaigns were dismissed by a majority of five against two.

In holding out its decision, the Court criticised the conduct of the election and expressed

concern for the continued involvement of the security forces in the conduct of elections where they have committed acts of intimidation, violence and partisan harassment; the massive disenfranchisement of voters by deleting their names from the voters' register, without their knowledge or being heard; the apparent partisan and partial conduct by some electoral officials; and the apparent inadequacy of voter education (Gloppen 2007:16).

The court further expressed disappointment at the EC'S inability to provide reports from returning officers to the court on the basis that the EC did not have them. These were mandated by law to be submitted to the EC. Again, it came out that the laws on elections were contradictory and inadequate (Gloppen 2007). Commenting on the decision, Siri Gloppen observed that the requirement provision that petitioners had to prove the irregularities substantially affected the results in order to provide the basis for overturning an election remained in force.

#### *Zimbabwe*

The Movement for the Democratic Change (MDC) contested the presidential election of Zimbabwe and lost. In *Movement of Democratic Change v. The Chairperson of the Zimbabwe Electoral Commission* (2008), the MDC instituted an action to the effect that the Zimbabwe Electoral Commission had delayed in releasing the results of the presidential election and applied to the High Court to release the presidential results. The Court admitted that the EC had inordinately delayed in releasing the results, but that the Court did not have jurisdiction in the matter because the decision of the EC 'shall not be subjected to appeal' by virtue of Section 67A (7) of the Electoral Act. Consequently, the decision of the EC was final. This decision was criticised because the case was not about the decision of the EMB. It was an application to the Court to review the action of the EMB, an administrative body, to compel it by mandamus to do its work. This is possible under the High Court Act which gave power to the High Court to review the 'proceedings and decisions' of 'administrative bodies' (Abuya n.d.:8).

### ***Analysis of the Selected Cases on Presidential Petitions***

The cases above provide a picture of how the courts in Africa are dealing with petitions on presidential elections. First, it is observed that the persons against whom the petitions were brought were incumbent presidents or their affiliates except Côte d'Ivoire where the incumbent who had lost challenged the results. In all the courts, decisions were given in favour of the incumbents or their affiliate whether as petitioners or respondents as happened in Zimbabwe, Ghana, Uganda, Kenya, and Côte d'Ivoire, except in Malawi where the court's decision went against the incumbent head of state. In the case of Côte d'Ivoire, the Constitutional Court reversed its decision to invalidate Gbagbo when he left the scene during the post-electoral crisis that ensued in Côte d'Ivoire.

Second, in all the cases the decisions of the courts invariably upheld the outcome of the work of the electoral management bodies even though they found evidence of malpractices and/or irregularities. In doing so some of the courts like that of Uganda condemned the electoral management bodies whereas others like Ghana recommended electoral reforms and called for the sanction of recalcitrant officials, whereas others seemed helpless. The basis of their decisions on irregularities was that the irregularities did not substantially affect the outcome of the elections and/or that it was not sufficiently proven to the satisfaction of the court that they substantially affected the outcome of the elections. Is it the courts' philosophy on petition on presidential election not to interfere with the elections even in the face of overwhelming irregularities? This is curious and further research would be needed to probe into the judicial reasoning on presidential electoral adjudication in Africa. As a matter of fact, petitions on presidential elections not included in those selected for analysis followed the same trend. In Nigeria, for example, all the petitions on presidential elections under Nigeria's Fourth Republic failed and the decision of the EMBs prevailed (*Abubakar v. Yar'Adua* 2009; *Buhari v. Obasanjo* 2005).

Third, there was a situation where the courts failed to address a substantive matter before it as occurred in the Ugandan case where an allegation of intimidation by Museveni was not addressed. Fourth, the court also addressed issues without providing remedies. The petition of the MDC of Zimbabwe is a case in point. There was a delay in the release of the results of the first round of the election. In light of this, the MDC applied to the High Court for an order to compel the EMB for a release of the presidential election results. Justice Uchena acknowledged the fact that there was a delay on the part of the EMB in announcing the outcome of the presidential election. Regardless of this, the judge presiding over the case failed to inquire into the delay, contrary to the said requirement of the constitution. The mere decla-

ration by the judge in addressing the impending delay was insufficient since no actions were taken in addressing the issue. Legal remedies legitimise litigation. Litigants go to court to seek redress for perceived wrong or infraction or violation of rights in that subject to public policy, the winner should obtain the fruits of the petition. 'As the UK House of Lords have emphasized, a decision maker must deliver substantial justice'. In other words, the adjudication process should be more than a formality (Abuya n.d.).

An audit of electoral disputes which included petitions on presidential elections between 1963 and 2013 in Kenya carried out by Thiankolu (2013:94) revealed that the courts seemed to have the inclination to resolve election petitions on the basis of technicalities as opposed to the substantive issues the petitions raised. Again the audit revealed that the courts were willing to 'expand the law with a view to summarily dismissing or striking out election petition on the one hand and an unflinching hesitation to expand the law to a substantive determination of the disputes on the merits'. Based on the findings from the audit, Thiankolu observed that the court's approach to handling the election petition was not consistent with the 'prevailing law, which required election courts to decide all matters before them without undue regard to technicalities'. This has 'diminished public confidence in the Judiciary as a neutral arbiter of political disputes'. Consequently, the perception held by observers and critics is that 'the prevailing judicial policy was to determine political disputes in favour of the status quo and the *'high and mighty'* in society' (Thiankolu 2013). The implication of the judicial approach has been manifested by the refusal of the key opponents to go to court about the 2007 Kenyan presidential elections when they resorted to violence. Does it mean that when presidential petitions are dismissed then justice has not been done or when they are upheld particularly against an incumbent and their affiliates then justice has been done? The foregoing calls into question the impartiality of the courts which is discussed in the next session.

In any case on the whole, the decisions of the courts brought finality to the disputes. This is so even where the disputants claimed not to be in agreement with the court. This leads to the closure of the issue. Even in Cote d'Ivoire the Constitutional Council had to reverse its decision to declare Quattara the winner of the 2010 after the electoral crises, in order to bring a finality to the matter. The judiciary in most countries are the final arbiter on electoral and other matters. They should endeavour to keep up to the expectation of the people.

### **Judicial Independence and Impartiality**

Judicial independence in constitutional democracies is hinged on separation of powers which connotes that in order to secure the liberties of individuals

in society, power should not be concentrated at any point in the political sphere, and advocates the division of government functions among three separate branches. The judiciary plays a crucial role in securing separation of powers by acting as a check on the other branches of government, thereby ensuring adherence to the constitutional limits placed on them through judicial review. Judicial review refers to the power of the judiciary in a constitutional government to review the decisions and actions of the other arms of government as to their constitutional propriety (Kline 2000). Judicial review ensures conformity with constitutional limits placed on public officials and adherence to all the constitutional provisions. Also, it allows for the compliance of validity, legality, rationality and reasonableness of governmental actions (Cumper 1999; Eastman 2005). In the contexts of electoral adjudication the judiciary exercises 'electoral judicial review'. Impartiality requires that the judges dispense justice without fear or favour.

The constitutions of countries in Africa provide for judicial independence by subjecting it to only the constitution. In Ghana, for example, the constitution is emphatic that neither the president nor his representatives nor parliament nor any person or authority whatsoever can interfere with judges or persons exercising judicial functions – Article 127(2). A judge is 'not liable for any act or omission done by him in the exercise of his judicial functions' – Article 127(3). The administrative expenses of the judiciary including salaries and allowances of its staff shall be charged to the consolidated fund – Article 127(4). The salaries and allowances of the judicial officers shall not be varied to their disadvantage Article 127(5). Monies voted by parliament or charged to the consolidated fund shall be released to the judiciary on a quarterly basis – Article 127(5). Similar provisions run through constitutions of other African countries. For example, Section 79 B of the Constitution of Zimbabwe states: 'In the exercise of his judicial authority, a member of the judiciary shall not be subjected to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary'. The Constitution of Uganda provides in Article 128 (1) that 'in the exercise of judicial power, the courts shall be independent and shall not be subject to the direction of any person or authority'. Article 128 (2) further states 'No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions'. Article 165 of the Constitution of Egypt mandates that 'judicial authority shall be independent. It shall be exercised by the courts of justice of different sorts and competences. They shall issue their judgements in accordance with law'. The judiciary is also insulated from party politics. For example, Article 113A of the Constitution of the United Republic of Tanzania states: 'It is hereby

prohibited for a Justice of Appeal, a Judge of the High Court, a Registrar of any grade or a magistrate of any grade to join any political party save only that he shall have the right to vote....' All these measures have been put in place to ensure the independence of judges for their impartiality.

The general perception though is that the judiciary in Africa is not independent in practice and doubts have been expressed about their impartiality; public trust in them is weak (Abuya n.d.). Judicial independence in electoral adjudication is mixed. In Nigeria, the president of the Court of Appeal refused a promotion to the Supreme Court for alleging that the promotion was 'hinged on mischievous reasons or malicious intents, as this appointment would pave the way for an amenable Court of Appeal President who would accept politicians' requests following anticipated petitions' (European Union 2011:39). He further submitted an affidavit to the Federal High Court against the Chief Justice which he later withdrew. A panel was set up by the Nigerian Bar Association and the National Judicial Council to look into the allegations. The investigations cast doubts on the credibility of the Court of Appeal which had the responsibility to set up electoral tribunals in Nigeria (European Union 2011).

On the one hand the courts have been bold to come up with decisions intended to correct electoral anomalies and fraud and have even reversed the decision of electoral management bodies by cancelling results, ordering reruns, and declaring those who had lost the election winners and the winners of declared results losers. These are mainly in respect of parliamentary elections and examples of such judicial firmness and boldness abound in Uganda and Nigeria. The perception of the High Court of Uganda on parliamentary election petitions in 2006 and 2011 elections is very positive because their decisions removed some powerful politicians from office. Even though some of their decisions were overturned on appeal they were considered real efforts on the part of the court to chart a path for rule of law on electoral matters (Gloppen 2007). The judiciary in Uganda was intimidated and attacked not rhetorically but physically and came under a lot of strain which caused some judges to decline to handle election cases (Gloppen 2007). Even then the role of the Ugandan judiciary in election earned it credibility, and has 'strengthened their pride, in the institution, and increased awareness of judicial independence in the legal community' (Gloppen 2007:14).

On the other hand, the story is different for presidential elections. With election petitions on presidential elections the courts have generally ruled in favour of the declared winners who are usually incumbent or would favour the incumbent as occurred in the presidential petitions of Nigeria, Zimbabwe, Ghana, Côte d'Ivoire, Uganda, and DRC Malawi. In Ghana, for example, there is no trust between the election petitioners and especially those



from opposing parties and members responsible for the adjudication of dispute. Some believe the judges who sit on the electoral dispute are biased in favour of the ruling parties. In Kenya, some of the losers of the 2007 election chorused that they would not go to court because they did not trust the judiciary and this resulted in mayhem leading to the Kenyan civil war (Abuya n.d.; Thiankolu 2013). In Senegal election petitions are very unusual and aggrieved persons in the electoral process rarely go to court for redress because of lack of confidence in it (Fall et al. 2011).

The perception of judicial bias notwithstanding, it should be observed that election disputes are highly politicised and courts' decisions on them, no matter what, are likely to be met with scepticism and criticism by the losing party and its supporters. This is so even in advanced democracies like the US. The US Supreme Court's decision in *Bush v. Gore* was met with scepticism, misgivings, and recommendations for the future (Garrett 2001; Choper 2001; Dorf n.d.; Pushaw Jr. 2001). Consequently, it has been argued that the judiciary should not be engaged in the resolution of electoral disputes and that such disputes should be handled by political arms of government, namely the legislature so as to insulate the judiciary from politics because judicial involvement in politics devalues it and lowers its legitimacy in a body polity (Choper 2001). The words of Nyerere, the former President of Tanzania, are very relevant when he said 'unless judges perform their work properly, none of the objectives of [a] democratic society can be met' (cited in Abuya n.d.:1.).

### **Proliferation of Electoral Adjudication: A double-edged Sword**

There is an upsurge of electoral petitions during the period under review. In Nigeria, for example, 574 petitions were filed in the election tribunals for the 2003 general elections and the numbers rose to 1,527 petitions in the 2007 general elections (Ubanyionwu 2011). In the parliamentary elections conducted in Zambia, 68 petitions were filed in the Zambia High Court (Awuor & Achode 2013). Similarly, in Uganda, the High Court received 47 petitions following the 2006 elections (Gloppen 2007), and over 100 petitions following the parliamentary election of Uganda in 2011 (Murison 2013). In Zimbabwe, the MDC-T party lodged 95 cases for its candidates following the 2013 election, but most of them were withdrawn by the candidates because the MDC-T could fund the required security deposit for only 39 candidates who were most likely to win leaving the remaining candidates to fund their own petitions. The security bond for election petition was a \$10,000 cash deposit.

The proliferation of election petitions is due to several reasons. The cases were instituted by people who had lost or were losing the election that formed the basis of the petitions. The issue then is why did they run to the court? Several factors may account for this. They ran to the court probably because they genuinely had concerns about the conduct of the elections due to irregularities, fraud or breaches of electoral regulations and governmental interference among others (Omotola n.d.), and were unable to accept the electoral outcome. These irregularities are usually provided for by electoral laws as grounds for challenging the declared results so they embarked on litigation as their civic right and duty. It is also due to the fact that disputants do not take steps to address pre-election irregularities through laid-down mechanisms until the end when they lose and try to reject the results due to irregularities. It may also be that they wished to expose the irregularities in court even if they did not win in the hope to improve the system next time around. They probably had difficulty in accepting defeat in the election competition and the court provided an avenue to vent their frustration and also in the hope that the results would be turned in their favour. The possibility of people rejecting election results no matter what by way of petition is high. The court of Nigeria draws this point home in *Ume V. Eneli* where the Honourable Justice Pats-Acholonu observed:

It is most unfortunate that our people have now formed the ungainly habit of rushing to the court when they are defeated in an election contest. In many cases, the parties indulge in rigging but one who is out rigged challenges the result of the election. In accusing the other and his minions of distortions he forgets to remove the bean in his eyes (quoted in Ubanyionwu 2011:322).

The large numbers of petitions put a lot of strain on the judiciary which is already beset with manpower and logistical challenges. If the trend is not curbed so that genuine cases go through adjudication, the whole idea of election adjudication would become so notorious that it would clog up and slow down the court processes and lose its purpose. Another problem is the challenge it poses to the political system by creating uncertainty in the governance of a country. Thus parliamentary candidates who are declared winners are invalidated at the court of first instance and removed from their seat for their opponents. On appeal they may win and get the seat back. This violates the voters' right to representation in government as it is not clear who their member of parliament is in the course of electoral *judicialization* or may not end up with their choice of representation.

### **Availability of Meaningful Remedies**

Legal remedies legitimise litigation. Litigants go to court to seek redress for a perceived wrong or infraction or violation of rights in that subject to public policy the winner should obtain the fruits of the petition. The petition of the MDC of Zimbabwe is the case in point. There was a delay in the release of the results of the first round of the election. In light of this the MDC applied to the High Court for an order to compel the EMB for a release of the presidential election results. Justice Uchena acknowledged the fact that there was a delay on the part of the EMB in announcing the outcome of the presidential election. Regardless of this the judge presiding over the case failed to inquire into the delay, contrary to the said requirement of the constitution. The mere declaration by the judge in addressing the impending delay was insufficient since no actions were taken in addressing the issue. 'As the UK House of Lords have emphasized, a decision maker must deliver substantial justice. In other words the adjudication process should be more than a formality' (Abuya n.d.). Also there have been instances where petitions were upheld but the decisions were handed out at a time when the term of the position the petitioners were vying for had either expired or was about to end. The whole process then becomes fruitless.

### **The Issue of Timeliness**

The legal maxim 'justice delayed is justice denied' implies that for one to say there has been a fair hearing the proceedings in connection with the hearing must be conducted in an expeditious manner. In the contexts of electoral adjudication, it is critical because of the electoral cycle which is time-bound. The Chief Justice of Ghana brings home the point when she observed: 'I appreciate the sobering fact that an important safeguard of election integrity lies in an effective resolution of complaints and appeals with minimum delay' (quoted in Judicial Service of Ghana, Manual on Election Adjudication 2012:6).

The laws of respective countries thus require electoral dispute to be dealt with expeditiously with time limits set in some cases. Kenya and Zimbabwe require 'petitions to be heard and determined expeditiously' (Abuya n.d.:10) and be given priority (Section 19 (4) and Section 23 (6) of the Kenyan National Assembly and Presidential Election Act; Section 172(3) of the Electoral Act of Zimbabwe). Available data indicate that some cases have been resolved by the courts expeditiously whereas others have been unduly delayed and have been overtaken by events rendering the exercise fruitless. Also, there have been instances where petitions were upheld but the decisions were handed down at a time when the term of the position the

petitioners were vying for had either expired or was about to end. The whole process then becomes fruitless.

In the analyses of 25 sample election cases in Kenya, Abuya reported that at the court of first instance, 28 per cent of the cases were dispensed with within a year, and 72 per cent varied between periods of three to four years which were required for expeditious resolution. At the appellate level 78 per cent of the cases were completed in a year and others took about three years (Abuya n.d.).

In Nigeria, it has been maintained that some cases under the Fourth Republic were dealt with in an expeditious manner and others were unduly long (Fall et al. 2011). Thus, the case of *Dingyadi v. Wamakko of Sokoto State* (as cited in Ubanyionwu 2011:328), in Northern Nigeria lasted for three years and eight months. In South Eastern Nigeria, the entire proceedings including the appeal in *Chris Ngige v. Peter Obi* (Ubanyionwu 2011:329) ended after 35 months to obtain justice for the 4-year mandate. In this case the petitioner who had lost the election was declared a winner and the election results declared for the 2007 governorship was set aside after three and a half years. In the South West of Nigeria there were undue delays in the resolution of electoral disputes in *Fayemi v. Oni* (2011) and *Aregbesola v. Oyinlola* (2011).

In the Ghanaian case of *Enos v. Electoral Commission and Another*, a petitioner who had lost the 1996 parliamentary election petitioned the High Court to invalidate the election results that had been declared in favour of his opponent. The High Court upheld the petition which was delivered in 1999 three years after the election and one year before the expiration of the term of the parliamentary seat being contested. In the *Republic v. Dramani*, the Ghanaian Court convicted and imprisoned a member of parliament for an electoral offence after the MP had served about half of his parliamentary term. The criminal proceedings were instituted against him after he had been declared a winner for having contested for the parliamentary seat while holding dual citizenship. The Constitution of Ghana disqualifies a Ghanaian who holds dual citizenship from contesting a parliamentary or presidential position.

The delay in the resolution of electoral complaints is caused by several factors. The absence of a legal time limit for the judiciary to hold down the decision is identified as a factor. In some of the jurisdictions e.g. Nigeria, Kenya and others, steps have been taken by way of law reform to set a time limit for the resolution of election petition by the courts (Sihanya 2013). Nigeria has amended the 1999 Constitution to introduce a time limit within which an election petition shall be completed. Thus, Section 9 of the

Constitution of the Federal Republic of Nigeria (second alteration) Act 2010, amended Section 285 and substituted it with a new Section 285 (5) – (8) which provides thus:

- (5) an election petition shall be filed within 21 days after the date of the declaration of the result of the elections;
- (6) an election tribunal shall deliver its judgement in writing within 180 days from the date of the filing of the petition;
- (7) an appeal of a decision by an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgement of the tribunal or Court of Appeal;
- (8) the court, in all final appeals from an election tribunal or court, may adopt the practice of first giving its decision and reserving the reasons therefore to a later date (Ubanyionwu 2011:332).

In consequence, ‘election petitions and appeals’ are to be resolved ‘within 240 days after the declaration of election results, which is about 8 months from the date of declaration of result’ in Nigeria (Ubanyionwu 2011:332). However, imposing a time limit on its own may not be a magic wand. The time limit should be realistic to allow for a hearing for justice. Nigeria experienced a situation where the time limit was unrealistic. The Electoral Act of Nigeria 1982 had imposed a time limit of 30 days within which an election petition had to be resolved. The Supreme Court of Nigeria in *Unongo v. Aper Aku* (1983) held that the time limit placed was unconstitutional. This is because the Act did not allow for a reasonable time for the parties in the election petition to have a fair hearing; neither does it allow the Court the constitutional stipulated time of three months after hearing a petition to deliver judgement. The electoral laws that followed eschewed time limits. This also led to delays in the handling of election petitions. The constitutional amendment aforementioned has been made to address this anomaly.

Other causes of delay are:

- The volume of petitions which adds to the already large volume of cases for the judiciary especially in situations where the mainstream courts double up as electoral courts.
- The judges lack the knowledge and technical know-how to address the complex issues of elections and, hence, their inability to deal with such matters in good time. For others, it is a sheer lack of professionalism and laziness which means they do not give due diligence to their work thus causing the delays.

- There is also a lack of accountability for dereliction of duty and the courts hide behind judicial independence because they are clothed with independence. The general public do not know their rights and think judges are immutable.
- Lack of logistics to help with the proceedings. Most courts in Africa still work on a manual basis. Judges actually write the proceedings themselves. There is also a lack of manpower expertise to aid in the administration of justice.
- Litigants filing complaints often do not accord it the seriousness it deserves in pursuing it.
- Unscrupulous lawyers who represent clients sometimes lack professionalism and create incessant delays (Ubanyionwu 2011:333).

Delays in the resolution of electoral disputes create uncertainty in the transitional process. Thus, where a contested position is being disputed in court it creates uncertainty for the one who had been declared the winner by the election results and also the electorates as well the one who is disputing the declared result. In Nigeria, for example, it has truncated the electoral cycle for gubernatorial elections. This was brought about because petitioners who had been declared winners for the gubernatorial term they had contested succeeded in convincing the court to let them serve their full term as opposed to the few unexpired months left of the term. Consequently, their full term ran to the next election period. Hence, it is not possible to run gubernatorial elections for all the states in Nigeria at the same time (Ubanyionwu 2011). Expedient resolution of election petitions by the courts is imperative for orderly democratic transitions.

### **Conclusion and Recommendations**

This paper has offered some insights into the emerging phenomenon of electoral adjudication in Africa. The idea of instituting an election petition in court as opposed to the aggrieved persons resorting to mayhem is a positive sign in the democratisation process. The aggrieved choose the law as their arbiter and put their hope in the law. Adjudication brings a closure to electoral disputes, all things being equal. This practice will facilitate the institutionalisation of democratic succession and entrench the rule of law and constitutionalism. The effective resolution would also mean a review of the work of the electoral management body by making them accountable. Thus, an EMB whose work has come under the scrutiny of the court is likely to improve upon its performance in the future, for such a review is likely to bring out the lapses in the system for possible reform.

The laws on elections should be clear, definite, adequate and consistent to avoid excessive room for discretion that leads to conflicting interpretation. There is a need for reform of electoral laws.

The judiciary should be candid, fair and impartial in the resolution of such disputes and work in an expeditious manner. Justice must not only be done, but that it should be manifestly and undoubtedly seen to be done is more relevant in Africa now than ever before.

Judges and lawyers should be trained to build capacity for the handling of electoral disputes.

The EMBs on the continent should live up to their mandates and deliver credible, free and fair elections and minimize or eliminate the incidence of fraud and irregularities.

There is a need for voter education and sensitization about the rules of the game of elections. Candidates in electoral contests should stand up to this reality and let elections end at the ballot box.

The aggrieved parties should take action to resolve pre-election complaints through laid-down processes and should not postpone seeking redress to post-election resolution.

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