

Abstract

This paper examines electoral adjudication in Africa's democratisation process. The idea of aggrieved persons instituting election petition in court as opposed to resorting to mayhem is a positive sign in Africa's democratisation process. The aggrieved choose the law as their arbiter and put their hope in the law. 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 these electoral disputes. Electoral disputes are not resolved expeditiously and courts decisions on such matters are sometimes overtaken by events. There is also the perception of judicial bias, corruption, and overwhelming political influence of the judiciary leading to lack of confidence in the process. In the same way the large numbers of election petitions put a lot of strain on the judiciary, clogging the courts. Alternate Electoral Dispute Resolution (AEDR), both formal and informal, offers avenues to resolving election dispute but this mainly pertains to pre-election disputes with post-election disputes being dealt with by the courts. In view of the proliferation of election petitions it is imperative that AEDR should be considered as a viable complement to adjudication. Also, voter education should be intensified on realistic expectations of elections by citizens so that election ends with the ballot and only genuine cases go through adjudication.

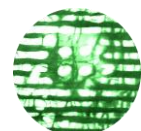
Keywords: election adjudication, election disputes in Africa, electoral justice, election petitions, electoral integrity, and alternate election dispute resolution

I.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 core 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 the sub-Saharan Africa.¹ More countries have since embraced multi-party political systems.

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Increasingly, mono-party and military regimes which plagued the continent are becoming obsolete.²

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 over-bloated voters register, over-voting and tampering of election figures among others.³ There are cases where losers and their affiliates reject the election outcome at any stage in the voting process or at the declaration of the results. Non-acceptance is registered in several ways ranging from protest, outrages, and demonstrations like the naked breast women's demonstration by elderly women of Nigeria and sex strike in Kenya⁴ to the perpetration of violence which sometimes leads to civil conflicts. Others resort to existing electoral justice mechanisms for remedy such as the courts or alternate dispute resolution.⁵ 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 import 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 globally⁶

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.⁷ 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

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December, in Dakar.

¹ Brown, S & Kaiser, P. (2007). Democratisations in Africa: Attempts, hindrances and prospects. *Third World Quarterly*, 28(6), pp1131-1149, at 1131 and 1133

² Segal, A. (1996). Can democratic transitions tame political successions? *Africa Today*, 43(4), 369-384.

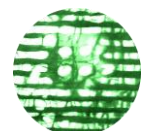
³ Omotola, S. -----Explaining Electoral Violence in Africa's Democracies----- p.55;

⁴ Ajayi, Kunle (2010) Exploring alternative approaches for managing electoral injustice in Africa: The case of breast protests in Nigeria and the sex strike in Kenya. ISS paper 214.

⁵ See for example Article

⁶ Foreword of Her Ladyship Georgina Wood, JSC, Chief justice of Ghana to the Manual on Election Adjudication in Ghana (2nd Ed.), 2012, p. 2

⁷ Fall, I.M., Hounkpe, M., Jinadu, A.L. & Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.



legal evidence of the factual issue(s) involved.”⁸ 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, Cote 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.⁹

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. 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 these electoral disputes. Electoral disputes are not resolved expeditiously and courts decisions on such matters are usually overtaken by events. There is also the perception of judicial bias, corruption, and overwhelming political influence of the judiciary leading to lack of confidence in the process.¹⁰ The role of the judiciary is very critical in safeguarding the ongoing democratisation in Africa by ensuring credibility in the adjudication of electoral disputes.

The laws on elections also create several offences which attract a fine or imprisonment upon conviction. There have not been enough prosecutions of election malpractices to warrant deterrence because of lack of political will and the failure of the police to enforce those laws.¹¹ There have not been enough prosecutions to warrant deterrence, although election related offences in Kenya and Cote d’Ivoire are currently being handled by the International Criminal Court. But electoral adjudication is a critical component of the ongoing democratisation process in Africa. This is because all that it takes to destabilize the process is for an aggrieved party to reject the election results where they are not sure of obtaining

⁸ International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: An Overview of the International IDEA Handbook. Bulls Tryckeri AB: Sweden, p.35.

⁹ See the United State election case of *Bush v Gore*, 531 US 98 (2000); also see International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: The International IDEA Handbook. Bulls Graphic: Sweden p.2 where the authors provide some decisions given by electoral justice systems.

¹⁰ Edwin Oldhiabo Abuya, The Role of the Judiciary in Promotion of Free and Fair Elections. Unpublished Manuscript; Fall, I.M., Hounkpe, M., Jinadu, A.L. & Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal;

¹¹ Nkansah L.A. (2012) Democratic Succession in Africa: The Quest for an Orderly Transition. Paper presented at a Conference on International Law in Africa under the Theme “The Quest for Human Security, Peace and Development: Challenges and Responses”, organised by the African Foundation of International Law (AFIL), the Centre for Human Rights, University of Pretoria, South Africa, the Institute for International and Comparative Law in Africa (ICLA), University of Pretoria, South Africa and Faculdade de Direito, Universidade Eduardo Mondlane, Mozambique, held from 5th-6th October, 2011 in Mozambique.



justice. Effective adjudication is a prerequisite for electoral justice in Africa in that it will ward off possible violence where the law redresses injustice and safeguards democracy.

This notwithstanding, the phenomenon is generally not 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”¹². In the contexts of Africa, literature on it is scarce. It is imperative that electoral adjudication in Africa is studied in order to craft the way forward for sustainable peace development. The lessons learned from this study are expected to inform electoral justice for the political developments of the continent. Against this background, the paper seeks to examine judicial adjudication of electoral disputes in Africa from the beginning of 1990-present—the second wave of Africa’s democratisation. In addition, the paper examines the viability of utilising alternative dispute resolution for resolving electoral disputes both as an alternative and complementary mechanism to the court.

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. It should be pointed out that 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 voters register 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.

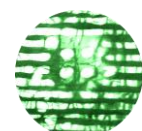
II. METHODOLOGY

The paper is anchored in the interdisciplinary legal paradigm. The interdisciplinary idea to the study of law emerged as a “reaction to the conventional approach to the study of law as known up to the 1960s.”¹³ The conventional approach was based on the firm belief that law was an autonomous discipline which should be studied as an end in itself.¹⁴ And attention was not given to the “fundamental questions about law’s nature, sources, and consequences as

¹² Avery Davis-Roberts, Electoral Dispute Resolution Discussion Paper for Experts Meeting, Atlanta GA – February 2009. P.3

¹³ S. Halliday, *Judicial Review and Compliance with Administrative Law*. Oxford: Hart Publishing (2004).

¹⁴ R.A Posner, The Decline of Law as an Autonomous Discipline: 1962-1987, *Harvard Law Review*, (1987). 761-780, at 762.



a social phenomenon or about its moral groundings”¹⁵ This conception of law as an autonomy is given way to embrace other disciplines on the basis that “law is a tool for achieving social ends, so that to understand law requires an understanding of social conditions.”¹⁶ This is because “law is a deliberate instrument of social control, so that one has to know something about society in order to be able to understand law, criticise it, and improve it.”¹⁷ Consequently, the doctrinal legal analysis was insufficient to study and understand law in terms of how it resonates in society.

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 and other alternate dispute resolution mechanism to resolve electoral disputes. 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 utilised available data by using existing materials. Research by available data differs from other forms of research in the sense that those other designs generate fresh facts and evidence, whereas research by available data uses existing materials. This approach is suitable because it is meant to examine the phenomenon of electoral dispute adjudication; events that have occurred. The sources of data as categorised include electoral laws of countries documents; private documents; mass media and social science data archives. Advantages of using available data are that there is no reactivity of measurement and cost effectiveness. Some difficulties of using available data have to do with finding the relevant information; inadequacy of data available; evaluation of the data as to its measures i.e. how, where, when and who aspects of the data; assessment of data completeness or the sample is crucial.

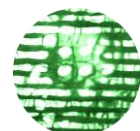
III.THE CONCEPT OF ELECTORAL JUSTICE AND ADJUDICATION

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) conceived electoral justice as the means, measures and mechanisms which have been wedged 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

¹⁵R. Cotterrell, Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies, 29(4) *Journal of Law and Society*, (2002) 632-644, at p.633

¹⁶ Ibid, p762

¹⁷ Ibid, p.763.



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”.¹⁸

These mechanisms pertain at the community, national and international levels and are embedded in the respective cultures and the laws of respective countries. 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”.¹⁹ It is at a 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”.

Electoral Justice System which the ACE Encyclopaedia referred to as electoral dispute resolution system is “a system of appeals through which every electoral action or procedure can be legally challenged.”²⁰ 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. Electoral justice mechanism may be a constitutional court, a branch of mainstream courts, specialised electoral courts or administrative court.²¹

Even though an electoral justice system is informed and shaped by the history, politics, law and cultures of a given country, electoral justice system 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.²² The electoral justice principles are meant to lead to procedurally- correct elections and obedience of citizen’s 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*.²³

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 case law upholds. The Protocol on Democracy and Good Governance adopted by the Economic Community of West

¹⁸ International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: The International IDEA Handbook. Bulls Graphic: Sweden p.1

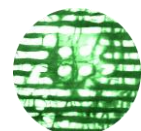
¹⁹ International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: An Overview of the International IDEA Handbook. Bulls Tryckeri AB: Sweden p.5

²⁰ ACE Electoral Knowledge Network. (2012). *The ACE Encyclopedia: Legal Framework*

²¹ International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: The International IDEA Handbook. Bulls Graphic

²² International Institute for Democracy and Electoral Assistance (2010). Electoral Justice: The International IDEA Handbook. Bulls Graphic

²³ Writ No. J/16/2013 retrieved on September 26, 2013 from www.judicial.gov.gh



African States 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”²⁴ Article 4 of 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 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 (2007) requires State Parties to “Establish and strengthen national mechanisms that redress election- related dispute 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 (ICCPR),²⁵ hence create international legal obligation.

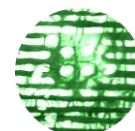
As indicated, adjudication is one of the mechanisms for electoral justice. The role of the judiciary in election adjudication is summed up into two main functions by Siri Gloppen²⁶ in his discussion of the role of Ugandan courts in election as: 1) resolving disputes over rules; ensuring that the rules create “*a level playing field –they are rule-evaluating.*”²⁷ 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*

²⁴ Article 1(b) of the Protocol on Democracy and Good Governance adopted by the Economic Community of West African States in 2002.

²⁵ International Covenant on Civil and Political Rights (adopted 16 December, 1966, entered into force 23 March 1973) 999 UNTS 171.

²⁶ Gloppen, Siri.(2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections

²⁷ Gloppen, Siri.(2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections. P.2



fair play-they are *rule-enforcing*”²⁸ 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. Other auxiliary functions of courts Siri Gloppen identified in electoral adjudication are that they serve as 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.

IV. ELECTORAL ADJUDICATION IN AFRICA

A. The Legal Regime of Electoral Adjudication System

The laws of African countries make room for electoral rights. The laws provide for electoral rights; the right to vote and be voted for and the right is protected by law and also the right to lodge a complaint to redress violations that may occur.²⁹ The laws on the electoral process make room for dispute resolution of issues that emanate from the process. This spans from issues relating to the demarcation of constituencies, challenging the registration processes as well as challenging the election results. Others are on the qualification of candidates, voter registration, the voter register, appointment of registration officers, voting and election results and others.

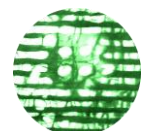
Judicial adjudication forms part of the electoral dispute resolution architecture. In this sense the courts are empowered to hear electoral dispute either as a court of first instance or in an appellate capacity on appeal from an administrative body as the case may be. The courts may be the mainstream 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.³⁰

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

²⁸ Gloppen, Siri.(2007)Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections

²⁹ See for instance 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.; sections 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

³⁰ See Fall, I.M., Hounkpe, M., Jinadu.,A.L.& Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.



High Court is 30 days.³¹ Also, other countries like Angola, 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.³²

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, 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.³³

This notwithstanding, the laws on electoral adjudication are in some cases inadequate,³⁴ clumsy, and the interpretation by the courts conflicting.³⁵ 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. It creates a situation that may require that it adjudicates over its own decision.³⁶ The management of electoral dispute in 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.³⁷

³¹ See the IESA African Democracy Encyclopaedia Project on Election Dispute

³² See the IESA African Democracy Encyclopaedia Project on Election Dispute

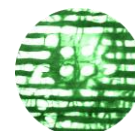
³³ See Fall, I.M., Hounkpe, M., Jinadu.,A.L.& Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.

³⁴ *Ahumah-Ocansey v Electoral Commission; Centre for Human Rights & Civil Liberties (Churchill) v Attorney-General & Electoral Commission (Consolidated)*. Writs No JI/4/2008 & No JI/ 5/2008). Digested in Digested in the Judiciary of Ghana Manual on Election Adjudication in Ghana (2nd Ed.), 2012 p.198-209 where Dotse JSC advocated that the need for further laws on election in Ghana; See also³⁴ Jenny B. Okello, Managing Successful Free and Fair Elections, A Lecture delivered at the at the Police Training School Kabalye-Masindi on 13 October, 2009.p.8 where he reported that the laws on election in Uganda is inadequate. He complained that there were no laws on absentee balloting, early voting of polling officials and security officials who are deployed on Election Day.

³⁵ Badru M. Kiggundu, Electoral Petitions, Regulation in Uganda: Challenges and best practices. Paper presented at the 8th Judges Conference held from 6th-9th February, 2006 at Sheraton Hotel, Kampala, Uganda

³⁶ See Fall, I.M., Hounkpe, M., Jinadu.,A.L.& Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.

³⁷ See Fall, I.M., Hounkpe, M., Jinadu.,A.L.& Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.



The jurisdiction of the courts in electoral matters is limited in some countries. In Tanzania, the results of presidential election cannot be challenged by law but that of parliamentary election can be challenged.³⁸ For 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*³⁹ 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 (tamko rasmi).”

Also Article 41(7) of the Union Constitution ousted the jurisdiction of the High from entertaining any matter on presidential election once the results are declared by the National Electoral Commission. In *Augustine Lyantonga Mrema and Others v Attorney-General*⁴⁰ 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*⁴¹ 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*⁴²

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.⁴³ Consequently the Constitution prevents independent candidates from contesting for 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

³⁸ See the IESA African Democracy Encyclopaedia Project on Election Dispute

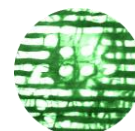
³⁹ [1996] TLR 156 (CA)

⁴⁰ [1996] TLR 273 (HC)

⁴¹ [1996] TLR 176

⁴² Civil Appeal No.45 Unreported. The decision of the Full Bench of Court of Appeal of Tanzania

⁴³ Hon. Justice Robert V. Makaramba, Trial and Management of Election Petitions by Courts: A Case of Tanzania, Paper presented at the Ninth EAMJA Annual Conference and General Meeting on “The Role of the East African Judiciaries in the Electoral Processes”, Held from the 11th -15th October, 2011 at the Imperial Resort Beach Hotel, Entebbe, Uganda



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.”

Commenting on the Mtikila’s 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 candidate 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.

The constitution of Zanzibar ousts the jurisdiction of the court into “anything done by the Electoral Commission in the performance of its functions.” The Electoral Act however makes room for the High Court to hear other petitions on elections.⁴⁴ 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.⁴⁵ 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.⁴⁶ 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.”⁴⁷ This has resultant effect where “organising and conducting election within a short time frame does not give the various stakeholders adequate time to internalise the requirements for participation in elections.”⁴⁸ 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 8th Parliament must have resigned at least three months prior to

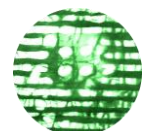
⁴⁴ See the IESA African Democracy Encyclopaedia Project on Election Dispute

⁴⁵ Section 172(2) of Electoral Act of Zimbabwe, 2005

⁴⁶ See Badru M. Kiggundu, Electoral Petitions, Regulation in Uganda: Challenges and best practices. Paper presented at the 8th Judges Conference held from 6th-9th February, 2006 at Sheraton Hotel, Kampala, Uganda.

⁴⁷ Jenny B. Okello, Managing Successful Free and Fair Elections, A Lecture delivered at the at the Police Training School Kabalye-Masindi on 13 October, 2009.p.8

⁴⁸ Jenny B. Okello, Managing Successful Free and Fair Elections, A Lecture delivered at the at the Police Training School Kabalye-Masindi on 13 October, 2009.p.8



their nomination. However at the time this law became effective, this three months were no longer available under the Constitution⁴⁹

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 well and sometimes the interpretation of procedural rules by the court would not have been clear to complainants and their legal representatives. This is shown in the large number of election cases that border on procedural matters.

The legal regime on electoral rights which include the right to redress in the electoral process should be streamlined to make the process transparent and effective.

B. The Courts and Election Petitions

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 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 it as such. It is neither criminal nor civil. The Nigerian case of *Obasanya v Obafemin*⁵⁰ defined election petition as 'complaint about election or the conduct of election'⁵¹ They are not regarded as ordinary complaint. In *Orubu v NEC*,⁵² and *Abdulahi v Elayo*⁵³ the Nigerian courts have held that election petitions are not ordinary petitions because of the importance of election for the wellbeing of democracy. As a result, it should not be subjected to procedural clogs, 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 & Others Interested Parties)*, the Supreme Court 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"⁵⁴

The complaints that make up electoral dispute vary. In Nigeria for example there have been complaints of;

“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

⁴⁹ Badru M. Kiggundu, Electoral Petitions, Regulation in Uganda: Challenges and best practices. Paper presented at the 8th Judges Conference held from 6th-9th February, 2006 at Sheraton Hotel, Kampala, Uganda.

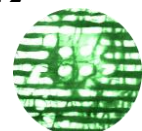
⁵⁰ (2000) 15(324). NWLR (pt.689)1

⁵¹ p. 324).

⁵² (1988)5 NWLR (pt. 94)323 at p.347

⁵³ (1993)1 NWLR (pt. 268)171

⁵⁴ [2009]SCGLR 460 and Digested in Manual on Election Adjudication in Ghana (2nd Ed.), 2012, p. 2



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.⁵⁵

Some complaints are on the delay of the release of election results of Election Management bodies as occurred in the Zimbabwean case.⁵⁶ The mechanics of adjudication of these complaints is discussed below.

1. Scenarios of Election Petitions

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 for rerun, and declared losers as winners and winners as losers. These are mainly in respect of parliamentary and other elections other than presidential elections and examples of such cases replete. In Nigeria for example, analysis of 426 of the petitions adjudicated at the first instance revealed that 96 of them were upheld and 222 did not succeed due to lack of merit.⁵⁷ Likewise in Uganda the court at 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 Ugandan electoral process.⁵⁸

Concerning petitions on presidential elections the courts have rarely overturned election results as declared by the Electoral Management Bodies. 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.

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*⁵⁹ 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

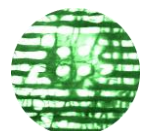
⁵⁵Strategies and Procedures for Expediting Election Petition and Appeals.

⁵⁶ *Movement of Democratic Change v The Chairperson of the Zimbabwe Electoral Commission*

⁵⁷Strategies and Procedures for Expediting Election Petition and Appeals.

⁵⁸ See Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda's 2006 Presidential and Parliamentary elections; Jude Murison Judicial politics: election petitions and electoral fraud in Uganda (2013). Journal of Eastern African Studies, 7(3),

⁵⁹ [2013]e KLR National Council for Law Reporting –Kenya Law Reports retrieved on September 26, 2013 from www.kenyalaw.org



the beneficiary of flawed presidential election as deputy president-elect represented. This case was consolidated with 3 other cases on the same matter.⁶⁰ The issues for determination by the Court were;

- I. Whether the 3rd [Uhuru Kenyatta] and 4th [William Samoei Ruto] Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th March 2013.
- II. Whether the Presidential election held on March 4th, 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.⁶¹

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.

Cote d'Ivoire

Cote 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% 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% 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 won the election and proclaimed Alassane Ouattara 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.

⁶⁰ *Moses Kiarie Kuria & 2 Others v Ahmed Issack Hassan & Another* (PETITION No. 3 of 2013) ; Gladwell Wathoni Otieno & Anor v Ahmed Issack Hassan & 3 Others (PETITION NO.4 of 2013)

⁶¹ *Raila Odinga v The Independent Electoral and Boundaries Commission others* p.7



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 % of the votes cast, with Nana Nana Addo Dankwa Akuffo Addo the flag bearer of the New Patriotic Party (NPP), obtaining 47.74%. In *Nana Addo Dankwa Akuffo Addo & 2 Others v John Dramani and Others*⁶². Akuffo-Addo, his running mate Mahamudu Bawumia and Jake Obetsebi-Lampitey, 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 January 7, 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:

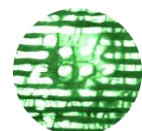
- I. Over- voting
- II. Voting without biometric verification
- III. Absence of the signature of a presiding officer
- IV. Duplicate serial numbers i.e. occurrence of the same serial number of pink sheets for two different polling stations
- V. Duplicate polling station codes i.e. occurrence of different results/pink sheets for polling stations with the same polling station codes
- VI. Unknown polling stations i.e. results recorded for polling stations which are not part of the list of 26, 002 polling stations provided by 2nd 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 the 7th and 8th December 2012 (over-voting, voting without biometric verification, absence of presiding officer's signature, duplicate serial numbers, duplicate polling station code, and unknown polling stations)
2. Whether or not, the said statutory violations, if any, affected the results of the election.

On the above issues the Supreme Court of Ghana unanimously dismissed the claims relating to IV, V, and VI, that is, the issues on 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 absence of the signature of a presiding officer the Supreme Court in a majority dismissed the claims and ruled that "In the circumstances the overall effect is that the 1st respondent was validly elected and the petition is therefore

⁶² Writ No. J/16/2013 retrieved on September 26, 2013 from www.judicial.gov.gh



dismissed.”⁶³ The Supreme Court of Ghana indicated the need for electoral reforms on several aspects of 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 had been received with mixed sentiments and the idea persists that the decision was against the weight of evidence.

Uganda

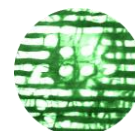
Museveni was declared the winner of the 2006 presidential elections of Uganda by 59 percent against Besigye who got 37 percent. In *Rtd. Cl. Kizza Besigye v The EC Yoveri Kaguta Museveni*⁶⁴ Besigye filed a petition on 7th March which was heard from 22- 30 March and a decision given on April 6, 2006 within 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 articles 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 candidate.

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

⁶³ The abridged judgment of the Supreme Court of Ghana delivered on 29th August, 2013 in respect of *Nana Addo Dankwa Akuffo Addo & 2 Others v John Dramani and Others*

⁶⁴ As reported in ⁶⁴ Gloppen, Siri.(2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections



manner.”⁶⁵ 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”⁶⁶ 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 by law were mandated to be submitted to the EC. Again it came out that the laws on elections were contradictory and inadequate.⁶⁷ 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 basis for overturning an election remained in force.⁶⁸

Democratic Republic of Congo

Kabila was proclaimed a winner of the 2006 election in DRC with 58.05% against Jean-Pierre Bemba who had 41.95%. Bemba appealed to the Supreme Court alleging vote rigging and massive irregularities. The irregularities complained of were vote by persons not entitled to vote, total absence of witnesses or observers, corruption of EIC officials and excessive manipulation and intimidation of voters. The court dismissed the petition.

Zimbabwe

The Movement for the Democratic Change (MDC) contested for the presidential election of Zimbabwe and lost. In *Movement of Democratic Change v The Chairperson of the Zimbabwe Electoral Commission*,⁶⁹ the MDC instituted an action to the effect that 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 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

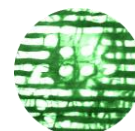
⁶⁵ Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections. P16.

⁶⁶ Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections. P.16

⁶⁷ Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections

⁶⁸ Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections. **p. 16.**

⁶⁹ *Movement for the Democratic Change v The Chairperson of the Zimbabwe Electoral Commission*. High Court of Zimbabwe at Harare delivered 14 April 2008 (uchena j) unreported.



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”.

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 elections, in the presidential election that she had contested because of irregularities for fresh election to be conducted in 90 days. The rival had won 40% with 30% votes counted, while Ms Banda placed second with 23%. The head of the Electoral Commission said that the president did not have the power to annul the election and the commission will go on with the counting in spite of the problems associated with it. The High Court rejected the decision of the president.

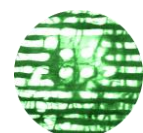
2. Analysis of the Selected Cases on Presidential Petitions

First, it is observed that the persons against whom the petitions were brought were incumbent presidents or their affiliates with the exception of Malawi. In all the cases decisions were given in favour of the incumbents or their affiliate whether as petitioners or respondents as happened in Zimbabwe, Ghana, Uganda, Kenya, DRC and Cote d’Ivoire. The only exception was Malawi where the court’s decision went against the incumbent government. In the case of Cote d’Ivoire Constitutional Court reversed its decision to invalidate Gbagbo when he left the scene during the post-electoral crises that ensued in Cote 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. The basis of their decision was that the irregularities did not substantially affect the outcome of the elections. The courts philosophy on presidential election petition seemed to be not to interfere even on 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 analyses took the same trend. In Nigeria for example all the petitions on presidential elections under Nigeria’s Fourth Republic failed and the decision of the EMB prevailed.

C. Proliferation of Electoral Adjudication: A Two Edged Sword

There is an upsurge of electoral petitions during the period under review. This is a positive sign in that aggrieved persons in the electoral process resort to the law as opposed to mayhem and violence. In Kenya for example the losers of the election resorted to violence which escalated in civil war, however in the same Kenya the losers of the 2001 election resorted to the court to seek redress. There is proliferation of election petitions on the continent of Africa. In Nigeria for example 574 petitions were filed in the election tribunals for the 2003 general



elections and the numbers rose to 1527 petitions in 2007 general elections.⁷⁰ In the parliamentary elections conducted in Zambia 68 petitions were filed in the Zambia High Court. Similarly in Uganda the High Court received 47 petitions following the 2006 elections,⁷¹ and over 100 petitions following the parliamentary election of Uganda in 2011.⁷² 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 \$10000 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 run 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,⁷³ 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 embark 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 do 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*⁷⁴ where 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 eyes⁷⁵

⁷⁰ Strategies and Procedures for Expediting Election Petition and Appeals.

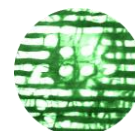
⁷¹ Gloppen, Siri.(2007)Elections in Court: the judiciary and Uganda's 2006 Presidential and Parliamentary elections

⁷² See Jude Murison Judicial politics: election petitions and electoral fraud in Uganda (2013). Journal of Eastern African Studies, 7(3),

⁷³ Omotola, S. -----Explaining Electoral Violence in Africa's Democracies, p. 61

⁷⁴ As cited in..... Strategies and Procedures for Expediting Election Petition and Appeals.....

⁷⁵Strategies and Procedures for Expediting Election Petition and Appeals. p 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 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.

D. 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 for 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.⁷⁶ Judicial review ensures conformity with constitutional limits placed on public officials and adherence to all constitutional provisions. Also it allows for the compliance of validity, legality, rationality and reasonableness of governmental actions.⁷⁷ In the contexts of electoral adjudication the judiciary exercises “electoral judicial review”.

The constitutions of countries in Africa provide for judicial independence by subjecting it to only the constitution.⁷⁸ 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.⁷⁹ A judge is “not be liable for any act or omission done by him in the exercise of his judicial functions.”⁸⁰ The administrative expenses of the judiciary including salaries, allowances of its staff shall be charged on the consolidated fund.⁸¹ The salaries and allowances of the judicial officers shall

⁷⁶ Kline, M. T. (2000). The Line Item Veto Case and the Separation of Powers. *California Law Review*. 88 (1), 181-233.

⁷⁷ Cumper, P. (1999). *Constitutional & Administrative Law* (2nd Ed.). London: Blackstone Press Limited.

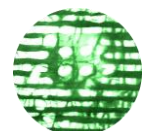
1999 Eastman, John C. (2005). Judicial review of unenumerated rights: Does Marbury's holding apply in a post-warren court world? *Harvard Journal of Law & Public Policy*, 28 (3), p.713-740.

⁷⁸ Article 127 (1) of the Constitution of Ghana

⁷⁹ Article 127 (2) of the constitution of Ghana

⁸⁰ Article (127 (3) of the constitution of Ghana

⁸¹ Article 127 (4) of the Constitution of Ghana



not be varied to their disadvantage.⁸² Monies voted by Parliament or charged on the consolidated fund shall be released to the judiciary on quarterly basis (Article 127 (5)). Similar provisions run through constitutions of other African countries. For example Sections 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 general perception is that the judiciary in Africa is not independent in practice and doubts have been expressed about their impartiality. Judicial independence in electoral adjudication is mixed. In Nigeria, the President of the Court of Appeal refused a promotion to the Supreme Court because he thought 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.”⁸³ He further submitted an affidavit to the Federal High Court against the Chief Justice which he later withdrew.⁸⁴ A panel was set up by the Nigerian Bar Association and the National Judicial Council into the allegations. The investigations would cast doubts on the credibility of the Court of Appeal which had the responsibility to set up electoral tribunals in Nigeria.⁸⁵

On 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, ordered for rerun, and declared 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 abounds 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.⁸⁶ The judiciary in Uganda was intimidated and attacked and came under a lot of strain which caused

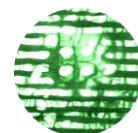
⁸² Article 127 (5) of constitution of Ghana

⁸³ European Union Observation Mission in Nigeria, Final Report on General Elections, April 2011, p.39.

⁸⁴ European Union Observation Mission in Nigeria, Final Report on General Elections, April 2011, p.39.

⁸⁵ Ibid.

⁸⁶ See Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections; Jude Murison Judicial politics: election petitions and electoral fraud in Uganda (2013). Journal of Eastern African Studies, 7(3),



some judges to decline to handle election cases.⁸⁷ 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”⁸⁸

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, Zimbabwe⁸⁹, Ghana, Cote d’Ivoire, Uganda, and DRC Malawi.⁹⁰ 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 such as the security forces. 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 resulted to mayhem leading to the Kenyan civil war.⁹¹ In Senegal election petitions are rare and hardly do aggrieved persons in the electoral process go to the court for redress because of lack of confidence in the court.⁹²

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 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 and misgivings and recommendations.⁹³ Consequently, some scholars have argued that the

⁸⁷ See Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections; Jude Murison Judicial politics: election petitions and electoral fraud in Uganda (2013). Journal of Eastern African Studies, 7(3) where the author reports of the Executive intimidation and attacks against the judiciary in their role in election petition.

⁸⁸ Gloppen, Siri. (2007) Elections in Court: the judiciary and Uganda’s 2006 Presidential and Parliamentary elections; Jude Murison Judicial politics: election petitions and electoral fraud in Uganda (2013). Journal of Eastern African Studies, 7(3), p.14

⁸⁹ *Movement of Democratic Change v The Chairperson of the Zimbabwe Electoral Commission*

⁹⁰ *Movement for the Democratic Change v The Chairperson of the Zimbabwe Electoral Commission*. High Court of Zimbabwe at Harare delivered 14 April 2008 (uchena j) unreported.

⁹¹ Abuya, Edwin Odhiamb. The Role of the Judiciary in Promotion of Free and Fair Election. Unpublished Manuscript.

⁹² Fall, I.M., Hounkpe, M., Jinadu., A.L. & Kambale, P. (2011). Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy. Open Society Foundations, Dakar, Senegal.

⁹³ For the various views on *Bush v Gore* See Elizabeth Garrett (2001). Institutional Lessons from the 2000 Presidential Election, *Florida State University Law Review* (Forthcoming), Chicago Public Law and Legal Theory Working Paper No. 13 Available at <http://papers.ssrn.com/paper.taf?abstractid=269658>; Jesse H. Choper. Why the Supreme Court should not Have Decided the Presidential Election of 2000. University of California Berkeley School of Law, Public Law and Legal Theory, Working paper No. 65, 2001. Available at <http://paper.ssrn.com/abstract=281869>; Michael C. Dorf. The 2000 Presidential Election: Archetype or Exception? (2000-2001). *Michigan Law Review* 99, 1279-1297, Cornell Law School Legal Studies Research Paper Series, Paper No. 13-38. Available at <http://ssrn.com/abstract=2214976>; Robert J. Pushaw, Jr. (2001). The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane. *Florida State University Law Review*. 29, 603-623;



judiciary should not be engaged with the resolution of electoral disputes and that such disputes should be handled by political arms of government so as to insulate the judiciary from politics in that judicial involvement in politics devalues it and lowers its legitimacy in a body polity.⁹⁴

E. Availability of meaningful remedies

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. 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.’⁹⁵ Also there have been instances where petitions were upheld but the decisions had been handed at a time that the term of the position the petitioners vied for had expired or were about to end. The whole process then becomes fruitless.

F. The Issue of Timeliness

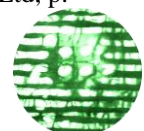
The legal maxim ‘justice delayed is justice denied’ implies that for one to say there has been a fair hearing the proceedings in connection with the hearing must be conducted in an expeditious manner. In the contexts of electoral adjudication it is very critical because of the electoral cycle which is 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”.⁹⁶

The laws of respective countries thus require electoral dispute to be dealt with expeditiously with time limits set in some case. Kenya and Zimbabwe requires “petitions to be heard and

⁹⁴ See Jesse H. Choper . Why the Supreme Court should not Have Decided the Presidential Election of 2000. University of California Berkeley School of Law, Public Law and Legal Theory, Working paper No. 65, 2001. Available at <http://paper.ssrs.com/abstract=281869>

⁹⁵ Abuya, Edwin Odhiamb. The Role of the Judiciary in Promotion of Free and Fair Election. Un`published Manuscript.

⁹⁶ Judicial Service of Ghana (2012). Manual on Election Adjudication in Ghana. Ghana: DPI Print Ltd, p.



determined expeditiously”⁹⁷ and be given priority.⁹⁸ Available data indicate that some cases have been resolved by the courts expeditiously whereas others have been unduly long and have been overtaken by events rendering the exercise fruitless. In the analyses of 25 sample election cases in Kenya, Buya reported that at the court of first instance 28 percent of the cases were dispensed with within a year, and 72 percent staggered between periods of three to four years which were required for expeditious resolution. At the appellate level 78 percent of the cases were completed in a year and others staggered for about three years.⁹⁹ In Nigeria it has been maintained that some cases under the Fourth Republic were dealt with in an expeditious manner. Others were unduly long. Thus the *Dingyadi v Wmakko of Sokoto State*,¹⁰⁰ in Northern Nigeria lasted for three years and eight months. In the South Eastern Nigeria, the entire proceedings including the appeal in *Chris Ngige v Peter Obi*¹⁰¹, 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 2007 governorship was set aside after three and half years. In the South West of Nigeria there were undue delays in the resolution of electoral disputes, in *Fawemi v Oni*¹⁰² and *Aregesola v Onyin Lola*.¹⁰³

The delays in the resolution of electoral complaints are caused by several factors among which are;

- The volume of petition which adds up to the already volume of cases for the judiciary especially in situations where the mainstream courts doubled up as electoral courts.
- The judges lack 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 sheer lack of professionalism and laziness which do not make them give due diligence to their work thus causing the delays.
- There is also lack of accountability for dereliction of duty and the courts hide behind judicial independence because they are clothed with independence. The general public don't know their right and think judges are immutable.
- Lack of logistics to help with the proceedings. Most courts in Africa still work on manual basis. Judges actually write the proceedings themselves. There is also lack of manpower expertise to aid in the administration of justice.
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⁹⁷ Abuya, Edwin Odhiamb. The Role of the Judiciary in Promotion of Free and Fair Election. Unpublished Manuscript. P.10.

⁹⁸ See Section 19 (4) and Section 23 (6) of Kenyan National Assembly and Presidential Election Act; Section 172(3) of Electoral Act of Zimbabwe

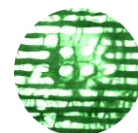
⁹⁹ Abuya, Edwin Odhiamb. The Role of the Judiciary in Promotion of Free and Fair Election. Unpublished Manuscript.

¹⁰⁰ As briefed in.Strategies and Procedures for Expediting Election Petition and Appeals p.328

¹⁰¹ As briefed in.Strategies and Procedures for Expediting Election Petition and Appeals p.329

¹⁰² (no. 11) EWL (PT. 554)1

¹⁰³ (2011)1 WRM 33.



- Litigants often filing complaints sometimes do not accord it the seriousness it deserves in pursuing it.
- Absence of legal time limit for the judiciary to hold down the decision.
- Unscrupulous lawyers who represent clients sometimes lack professionalism and create incessant delays.¹⁰⁴

G. Acceptance of Judicial Decision by contestants

There is a positive sign in that on the whole the decisions of the courts are accepted by the contending parties. This is so even where they claim not to be in agreement with the court. This leads to the closure of the issue. This is a pointer that democracy is maturing in Africa and very hopeful. But this should not be taken for granted. 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.

V. ALTERNATIVE ELECTORAL DISPUTE RESOLUTION

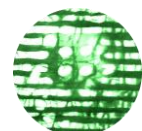
This section examines the viability of alternate dispute resolution or out-of-court resolution of election dispute. The idea of alternative dispute resolution is well established in legal systems as a means of addressing myriad forms of disputes. These could be formal and informal. In the contexts of election disputes, Alternate Electoral Dispute Resolution mechanisms (AEDR) have emerged. The AEDR approaches include compromise, mediation, conciliation, negotiation, dialoguing, etc. Debates surround the suitability of out-of-court resolution of election disputes. Some legal scholars argued that alternative dispute resolution is unsuitable for resolving the complexity of election disputes whereas others maintained that it could provide a viable alternate to the courts.

Critics argued that election is a zero sum game—you win or you lose. A dispute resolution should therefore follow suit to determine who wins or who loses. There is no middle way and there is no room to share or split the pie so any AEDR mechanism that is intended to slice the pie is unsuitable.¹⁰⁵ “Democracy demands a winner and a loser. There is nothing in election *Beyond Winning*.”¹⁰⁶ AEDR may not lead to the closure of the dispute and the dispute may eventually end up in court as it is the case with ADR practice whereas litigation when determined brings a closure to an electoral dispute. Lawyers in particular prefer litigation in court to mediation in post-election contexts since that is a familiar constituent that had been

¹⁰⁴ As briefed in.Strategies and Procedures for Expediting Election Petition and Appeals p.333.

¹⁰⁵ See Rebecca Green (2012). Mediation and Post Election Litigation, *Ohio State Journal on Dispute Resolution*, 27(2). P53-98 where the author gives an overview of the literature on non-judicial resolution of election disputes. See also Lawrence Susskind (2002). Could Florida Election Dispute Have Been Mediated? *Dispute Resolution MAG*. Winter at pp. 8 &10

¹⁰⁶ Roger Fisher &William Ury as quoted in Rebecca Green (2012). Mediation and Post Election Litigation, *Ohio State Journal on Dispute Resolution*, 27(2), pp53-98, at p.53.



tried and tested.¹⁰⁷ There is also the issue of neutrality of mediators or arbitrators. Proponents of AEDR on the other hand maintained that AEDR could enhance electoral justice because it provides for; “easier, faster and more cost effective access to justice; a less threatening environment for the disputants; the possibility of win-win outcomes for all disputants; and the opportunity to circumvent the problems of discredited EDR mechanisms”¹⁰⁸ Rebecca Green, a proponent of AEDR, adds that it has an advantage of legitimising democracy when it provides timely resolution as opposed to protracted adjudication and that disputants are able to work out their interest fairly and quickly.¹⁰⁹

In the contexts of EDR systems in Africa both formal and informal AEDR exists but these deal mainly with pre-election disputes. Thus several African countries have out-of-court resolution platform for handling pre-election disputes both at the formal and informal levels.¹¹⁰ For example South Africa and Lesotho have institutionalised interparty liaison committees that serve as a platform to engage the EMB and political parties for consultation and cooperation on election matters.¹¹¹ Also, in Ghana there is an Inter Party Advisory Committee (IPAC) formed in March by the Electoral Commission of Ghana in 1993 following the criticisms of the 1992 elections. Currently it is instituted at the regional, district and constituency levels. The IPAC brings representatives of political parties to a forum with the Electoral Commission of Ghana on election matters. The IPAC forum has resulted in critical electoral reforms in Ghana and addressed issues of contention at various stages of the electoral cycle.¹¹²

However, post-election disputes are mostly mandated by the law to be resolved through the court. In view of the potential of resolving some election disputes through AEDR, they should be nurtured to complement adjudication. This is possible because within the African contexts settling dispute out of court is the norm rather than the rule. African indigenous dispute resolution mechanisms have informed Western theories and practice of ADR and are being reshaped and reconstituted at the macro and micro levels both in Africa and elsewhere. It would therefore not be out of place to consider AEDR and have it institutionalised within the

¹⁰⁷¹⁰⁷ Aminu Adamu Bello and Rahima Aminu, Situating Alternate Dispute Resolution (ADR) in the Political Sphere: Thoughts on Mechanisms for Pre-Election Political Dispute Resolution in Nigeria. Available at <http://ssrn.com/abstract=1369702> . Retrieved June 24, 2014

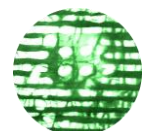
¹⁰⁸ The International Institute for Democracy and Electoral Assistance (2010). *Electoral Justice: The International Idea Handbook*. Sweden; Bulls Graphic p. 188.

¹⁰⁹ Rebecca Green (2012). Mediation and Post Election Litigation, *Ohio State Journal on Dispute Resolution*, 27(2). P53-98.

¹¹⁰ See for example in Ghana the laws on election make room for out of court resolution of pre-election disputes on issues that emanate from the process. This spans from issues relating to the demarcation of constituencies, *appointment of registration officers* challenging the registration processes

¹¹¹The International Institute for Democracy and Electoral Assistance (2010). *Electoral Justice: The International Idea Handbook*. Sweden; Bulls Graphic

¹¹² Sylvia Annoh, Research on Inter Party Dialogue in Ghana; IPAC (2010).International Idea



electoral justice architecture of respective countries. In fact Ad hoc international mechanisms were instituted outside the constitutional framework of Kenya and Zimbabwe to address post-election disputes. In the case of Kenya the African Union through Kofi Annan, the former UN Secretary-General, mediated the Kenyan post-election violence of 2007 that led to the establishment of a coalition government.¹¹³ Similarly the Southern African Development Committee (SADC) appointed Thabo Mbeki, former South African President, to mediate in the post election violence that followed the 2008 election in Zimbabwe. This culminated into power-sharing agreement and the formation of the government of national unity.¹¹⁴

Although it should be pointed out that not every electoral dispute would be amenable for AEDR, the International Foundation for Election Systems (IFES) examined the possibility of ADR being utilised to address election disputes. IFES identified certain election disputes cases that are not amenable for ADR. These included (1) cases relating to fundamental rights, (2) cases in which binding precedents are desirable, and (3) cases in which the court system can provide a timely, credible decision.”¹¹⁵ Each electoral system should disaggregate electoral disputes in terms of those amenable for AEDR. Nigeria for example, after extensive deliberations, consider AEDR as suitable for addressing pre-election disputes.

Yet non-inclusion of AEDR in post-election dispute resolution as the current position seems to be excludes a viable approach to resolving post-electoral disputes amicably. This is in no way suggesting that AEDR should replace adjudication by the court, because when AEDR does not work the matter may end up in Court; but that parties in a post-election dispute should be allowed to resort to AEDR when they deem it fit. In this way the burden on the court could be lessened and parties may succeed in working out a position that caters for their interest and that of their supporters. With AEDR, election may not always be a zero sum game after all in all cases.

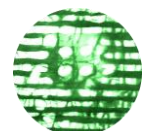
VI. CONCLUSION AND RECOMMENDATIONS

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

¹¹³ The International Institute for Democracy and Electoral Assistance (2010). *Electoral Justice: The International Idea Handbook*. Sweden; Bulls Graphic

¹¹⁴ The International Institute for Democracy and Electoral Assistance (2010). *Electoral Justice: The International Idea Handbook*. Sweden; Bulls Graphic

¹¹⁵ Cited in Rebecca Green (2012). Mediation and Post Election Litigation, *Ohio State Journal on Dispute Resolution*, 27(2). P53-98, p.70.



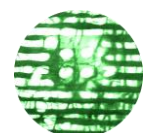
making them accountable. Thus, an EMB whose work has come under the scrutiny of the court is likely to improve upon its performance in the future, for such a review is likely to bring out the lapses in the system for possible reform.

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

The judiciary should be candid, fair, and impartial in the resolution of such disputes expeditiously. Judicial independence is critical to the process. It should be observed that judicial independence is enshrined in the Constitutions of African countries. Yet, the judiciary in several African countries are plagued with corruption, unfair trials, political influence, and resource and capacity problems to handle such disputes effectively. As a result they do not have the confidence and trust of the people. It should be pointed out that electoral politics have polarised African countries so a decision on an electoral dispute is likely to receive mixed responses. The judiciary of Africa should rise above party sentiments. 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 should be trained to build capacity for the handling of electoral disputes. 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.”¹¹⁶

The issue of proliferation of election petition came up. It should be observed that elections are so characterised with problems of overwhelming fraud, irregularities that individuals who lose elections find it difficult to accept defeat or the election results because of the irregularities that characterise them. It should be noted that some candidates will not accept defeat in an election no matter what and would rush to the court. There is the need for voter education and sensitisation about the rules of the game of elections. Candidates in electoral contest should stand up to this reality and let elections end at the ballot box. Of course this will mean that the EMBs on the continent should live up to their mandates to deliver credible elections. The aggrieved parties should take action to resolve pre-election complaints through laid down process and should not postpone seeking redress to post-election resolution. AEDR platforms should be explored to complement adjudication. Respective countries should explore the possibility.

¹¹⁶ Cited in Edwin Oldhiabo Abuya, *The Role of the Judiciary in Promotion of Free and Fair Elections*. Unpublished Manuscript. p. 1.





Dispute resolution and electoral justice in Africa : The way forward

