

EISA PRE-ELECTION ASSESSMENT MISSION REPORT



KENYA
23 - 27 MAY 2022

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LIST OF ACRONYMS

CAK	Communication Authority of Kenya
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CSO	Civil Society Organisation
EDR	Election Dispute Resolution
EISA	Electoral Institute for Sustainable Democracy in Africa
EMB	Election Management Body
EOM	Election Observation Mission
GBV	Gender-Based Violence
IEBC	Independent Electoral and Boundaries Commission
KANU	Kenya African National Union
KIEMS	Kenya Integrated Election Management System
KPU	Kenya People's Union
MCK	Media Council of Kenya
MVR	Mass Voter Registration
NASA	National Super Alliance
NCIC	National Cohesion and Integration Commission
ODM	Orange Democratic Movement
ORPP	Office of Registrar of Political Parties
PAM	Pre-election Assessment Mission
PPDRT	Political Parties Dispute Resolution Tribunal
PWD	Persons with Disabilities
PVT	Parallel Voting Tabulation
TNA	The National Alliance
UDA	United Democratic Alliance

1. EXECUTIVE SUMMARY

In order to contribute to stronger democracy, increased citizen participation and more resilient public institutions, the Electoral Institute for Sustainable Democracy in Africa (EISA) assesses electoral processes across the African continent. In line with its methodology for international election observation, EISA conducts a pre-election assessment ahead of the deployment of its election observation missions (EOMs). The conduct of pre-election assessments is in keeping with EISA's vision for an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment. This vision is realised through the promotion of credible elections, participatory democracy, a culture of human rights and strengthening of governance institutions for democratic consolidation in Africa.

In preparation for the deployment of its EOM to Kenya, EISA sent a pre-election assessment mission (PAM) to Kenya from 23 to 27 May 2022. The two-person team consisted of Ms. Cecile Bassomo, STEP Elections and Political Transitions Specialist, and Tawanda Chimhini, Country Director, EISA Tanzania.

The PAM's objectives were threefold. The first objective was to assess the political and pre-election environment leading up to the general elections on 9 August, and to establish whether that environment was conducive for democratic elections. The PAM also aimed to determine whether the deployment of international election observer groups, including EISA's, would further contribute to strengthening electoral democracy in Kenya. Lastly, the PAM also sought to gauge the state of preparedness of key election stakeholders. In so doing, the EISA PAM consulted public institutions, civil society organisations (CSOs), political actors, and local and international technical and financial partners based in Nairobi, Kenya.

The EISA PAM noted that the 2022 general elections would be held within a general context marked by political realignment and the emergence of political alliances between the president of the Republic and the leader of the Orange Democratic Movement (ODM) on one hand,

and the deputy president and a member of parliament, formerly a personal assistant of the outgoing president of the Republic. The mission further noted that the formation of these two political alliances has created a unique and atypical executive arrangement culminating in a shift in ethno-regional balance.

Based on a review of Kenya's constitutional and legal framework as well as consultation with interlocutors, the mission further noted that the forthcoming elections will be conducted largely on the basis of the framework that governed the 2017 general elections. The mission observed that no significant proposed electoral reform laws besides the Political Parties Amendment Act of 2022, were passed ahead of the forthcoming elections. With the inclusion of a coalition political party in the legal definition of a political party, the amendment law has created a second form of coalition distinct from the other type of coalition previously practised in Kenyan politics. The mission noted that the emergence of the coalition political party has afforded a legal opportunity to existing political parties to legalise electoral pacts agreed upon at political party leadership level. The requirement that political parties publish and file their internal nomination processes is a positive step which will contribute to strengthening the internal transparency and accountability mechanisms of political parties. Yet, all the draft amendments to the electoral regulations proposed by the Independent Electoral and Boundaries Commission (IEBC) were still pending before the National Assembly two months prior to election day. Late amendments to the electoral regulations pertaining to critical issues, such as the use of technology for the electronic transmission of election results, have contributed to amplifying public speculation over the capacity of the electoral authority to deliver a credible and transparent process. The EISA PAM also noted the persistent gap in the implementation of the two-thirds gender principle and the election campaign financing regulations which continue to be a matter of legal wrangle between the IEBC and the courts.

The EISA PAM noted that the electoral authority was fully constituted almost a year before the general election date following the nomination of four new commissioners,

including the vice-chairperson, who resigned after the conclusion of the 2017 elections. The EISA PAM observed that the Supreme Court's ruling on the integrity of the 2017 electoral process left an indelible mark on public perception of the IEBC as a credible, open, and capable electoral authority.

The EISA PAM noted constructive efforts made by stakeholders in preparation for the forthcoming general elections, including peace and social cohesion initiatives carried out by the National Cohesion and Integration Commission (NCIC) and civil society groups. The mission is of the view that key election stakeholders should individually and collectively leverage constitutional arrangements and ongoing initiatives to build consensus around contentious issues so long as there is open, regular, and consistent communication. This is key to defusing tension around critical aspects of the electoral process such as the electronic transmission of election results. The deployment of international election observer missions, by EISA and other groups, will add value to the transparency of the process and was welcomed by stakeholders met by the EISA PAM.

2. HISTORICAL BACKGROUND AND CONTEXT OF THE ELECTIONS

2.1 HISTORICAL BACKGROUND

Kenya has a long history of conducting elections stretching back to 1920 when the country was a British colony. However, Africans in Kenya received the right to vote for the first time in 1957, during legislative elections in which they were allowed to vote for eight African seats. Universal suffrage was only extended to everyone in Kenya in 1961 with 65 seats being contested. In that election, KANU won most seats.¹ During the 1963 elections, the electoral system was further changed with an increase of 65 to 129 seats in the House of Representatives and 38 seats in the Senate.

Following a fall-out between President Jomo Kenyatta and the country's first vice president, Jaramogi Oginga Odinga, the Kenya African National Union (KANU) split largely along tribal lines. This resulted in the formation of the Kenya People's Union (KPU), consisting largely of the Luo, being led by Odinga. A by-election was called following an amendment to the Constitution in 1966 which saw KPU winning most votes while KANU won most of the seats.

The Senate was subsequently abolished, and the House of Representatives was transformed into the National Assembly. Jomo Kenyatta introduced a one-party state in 1969 and the KPU was immediately banned.

During one-party rule, KANU won elections in 1969, 1974, 1979, 1983 and 1988. During this period, Jomo Kenyatta died in office in 1978 resulting in power being transferred to Vice President Daniel Arap Moi.

Multi-party democracy was restored in 1992 and Daniel Arap Moi won both the 1992 and the 1997 elections before starting to groom Uhuru Kenyatta to succeed him. The 2002 elections saw a loose coalition of opposition parties forming to contest the election under Mwai Kibaki. KANU lost to the coalition which was supported by Raila Odinga and the coalition collapsed immediately after the election.

The 2007 elections were characterised by massive tribal violence resulting in over 1 300 fatalities with at least 600 000 people being displaced. Uhuru Kenyatta and his running mate, William Ruto, were later to be indicted and charged with inciting violence against Raila Odinga's supporters. Both Uhuru Kenyatta and William Ruto were acquitted, in December 2014 and April 2016 respectively. It is important to note that the International Criminal Court case against these two was the first of its kind in which a sitting president and vice president were charged and appeared to answer charges.

In 2008, Mwai Kibaki (who had been announced the winner of a disputed election in 2007) and Odinga signed

¹<https://www.africanews.com/2017/10/25/a-look-at-kenya-s-elections-history-since-independence-in-1964/>

a power-sharing agreement facilitated by the then UN Secretary General, Kofi Annan. Through a National Accord and Reconciliation Act, Raila Odinga became prime minister of Kenya while Kibaki remained president. Other parties were also co-opted into the inclusive government that led to the passing of a new constitution in 2010 after a referendum, and the setting up of the Independent Electoral and Boundaries Commission. The 2013 elections, which pitted Uhuru Kenyatta and his running mate William Ruto against Raila Odinga and Kalonzo Musyoka, were the first to be run under a new constitution by a new election management body and combined with the election of the newly formed Senate, the National Assembly and Kenya's local elections.

The elections were won by Uhuru Kenyatta's The National Alliance (TNA) by 50.51% of the vote while the opposition, the Orange Democratic Movement (ODM) got 43.7%. The incumbent, Mwai Kibaki, could not contest in the election on account of restrictions in term limits introduced by the 2010 Constitution. A challenge to overturn the electoral outcome was deemed unsuccessful by the Supreme Court of Kenya.

The 2017 elections were won by Uhuru Kenyatta and his running mate, William Ruto of the Jubilee party, with 54% of the vote. This was however nullified by the Supreme Court after the outcome was challenged by the opposition, Raila Odinga of the National Super Alliance (NASA). Fresh elections were ordered to be held within 60 days.

The results of the parliamentary and local elections were not challenged, with Jubilee winning the majority in Senate (34 of the 67 seats) and retaining its majority in the National Assembly with 171 of the 341 seats.

Jubilee Party won the rerun of the presidential election by a landslide, following the withdrawal of the NASA on grounds that the process would not be credible and that their demands for electoral reforms had not been met.

2.2 CONTEXT OF THE 2022 GENERAL ELECTIONS

On 9 August 2022 Kenya will hold general elections which will be the third time that the country's electoral democracy is tested on the basis of the progressive 2010 Constitution. The 2022 elections will be held against the backdrop of a history of disputed electoral outcomes. Politics in the country is largely viewed as being tribal in nature, and this contributed in part to extensive violence in the aftermath of the 2007 elections. However, elections are also increasingly being contested on the basis of both loose and formal coalitions that are made and unmade, depending on political and ethno-regional interests. The political context of this election is marked largely by a shift in political alliances grounded in ethno-regional dynamics. The 2022 elections will pit current Vice President William Ruto of the United Democratic Alliance party (UDA), supported by a loose coalition, Kenya Kwanza, against the former Prime Minister, Raila Odinga of the Orange Democratic Movement (ODM) backed by the Azimio La Umoja coalition, currently chaired by President Uhuru Kenyatta through his Jubilee party. This political realignment resulted from the 2018 handshake between the outgoing president and Raila Odinga, a former political opponent.

The political context is also heavily affected by the Supreme Court nullification of the 2017 presidential election. There is a high likelihood that the major contenders will dispute the 2022 election outcome and that the matter will be left to the courts, with a ripple effect at community level. Opinion polls released in the first half of 2022 indicated a slim margin between the two contenders. Far-reaching consequences of the threshold set by the 2017 Supreme Court ruling on the electoral process further contributed to increased levels of public anxiety about Parliament's late review of the draft amendments proposed by the electoral authority in 2020. The pre-election context is also significantly affected by the adoption of the Political Party Amendment Act. This revised Act has led to the legalisation of negotiated elite pacts through the creation of a coalition political party which gives political formations the option of formalising and consolidating pre-election alliances within binding, power-sharing agreements.

The immediate pre-election context has also been marked by political party primaries and nominations that, though still contentious, were considerably less violent than past processes. This was because several political parties traded off internal democratic processes for negotiated elite pacts and consensus building around candidates which left women, youth, and Persons with Disabilities (PWD) on the margins of intra-party and national processes. The exclusion of these segments of the population, particularly women, has exposed the ongoing electoral process to the risk of failing to meet the constitutionally-enshrined two-thirds gender principle.

The context has also been impacted by the narrative of Deputy President Ruto about the country's economic model which has mostly favoured the elite and the wealthy. He has led a campaign driven by the 'hustler' versus 'dynasty' rhetoric which has resonated among different segments of the Kenyan society. This applied to the youth in particular, living in an economic context beset by high unemployment rates, a high level of public debt, and the rising prices of basic commodities caused by the fallout of the global COVID-19 pandemic and the Russia-Ukraine conflict.

The recent nomination of deputy president running mates by the main contenders has introduced new dynamics in the ongoing political competition. In particular, the nomination by the Odinga-Kenyatta camp of Martha Karua, a former Minister of Justice and social justice advocate, has elicited great hopes and expectations amongst Kenyan women still battling the fight for gender equality and against gender-based violence in Kenya's male-driven politics. The choice by the main contending coalitions of two aspiring deputy presidents from the dominant Kikuyu ethnic community indicates the centrality of ethno-regional politics in Kenya, particularly when for the first time in the country's political history, a candidate from the dominant ethnic group will not vie for the presidential seat.

The context is also marked by mixed feelings of election stakeholders about the capacity of the IEBC to deliver a credible election. However, some confidence in the

judiciary was expressed by a significant number of stakeholders met by the EISA PAM should the courts need to decide the outcome. Overall, stakeholders engaged during the pre-election assessment mission described the context of the elections as being 'tense' and with 'very high stakes' on the line. Anxiety was expressed around integrity issues in the elections, and civil society in particular indicated that the constant threat of deregistration made their work very difficult.

3. COVID-19

Following the outbreak of the COVID-19 pandemic in Kenya the government imposed a nationwide curfew in March 2020. The president of the Republic lifted the curfew on 20 October 2021, approximately two weeks after the launch of the first mass voter registration (MVR) by the Independent Elections Boundaries Commission (IEBC). Interlocutors of the EISA PAM were unanimous that the COVID-19 pandemic did not have a direct impact on operations conducted in preparation for the 2022 general elections. They noted that this first MVR drive was conducted at a time when the country was returning to some degree of normality. The EISA PAM noted a firm consensus among interlocutors about the dire implications of the pandemic on the socio-economic conditions of ordinary Kenyans, and widening social inequalities in the country which drove several Kenyans to relocate from their homeland. During a visit to the IEBC Head Office, the EISA PAM noted that the commission recommended the observance of COVID-19 health protocols, including wearing facial masks, hand sanitising and social distancing on its premises.

4. THE CONSTITUTIONAL, LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING THE ELECTIONS

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4.1 CONSTITUTIONAL AND LEGAL FRAMEWORK

The Supreme Law of Kenya sets the second Tuesday of August every fifth year as the date for general elections, as enshrined in Articles 10(1) and 13(2). In accordance with Article 136(2a), the election of the president shall be held concurrently with the election of members of parliament. In compliance with these constitutional arrangements, Kenya will hold fresh general elections on 9 August 2022.

Kenya's forthcoming general elections are governed by the national regulatory framework, comprising several key pieces of legislation, and the international normative framework for democratic elections. The supreme law of Kenya provides that the general rules of international law and any treaty or convention ratified by Kenya shall form part of the country's legal framework. Kenya has ratified the key international and African human rights instruments pertaining to elections.

The legal framework includes the 2010 Constitution of the Republic of Kenya, the 2011 Elections Act, the 2011 Political Parties Act, the 2011 Independent Electoral and Boundaries Commission Act, the 2016 Electoral Law Amendment Act, the 2016 Elections Offences Act, the 2017 Elections Laws

Amendment Act, the Leadership and Integrity Act of 2012, the Supreme Court Act No. 11 of 2011, Electoral Regulations/Subsidiary Law Number 24 of 2012, and the Public Order Act of 1951.

To safeguard the sovereignty of the people, Chapter 1 of the 2010 Constitution recognises their supreme right to exercise their power either directly or through their democratically elected representatives in regular elections that are free from violence, intimidation, or corruption. The bill of rights, contained in Chapter 4 of the Constitution, guarantees fundamental freedoms and electoral rights, including the right to freedom and security for everyone; freedom of opinion, freedom of expression, freedom of the media, access to information, freedom of association, freedom of movement and residence, access to justice and the right to vote in an election or referendum by universal, direct, and secret suffrage. In view of the aspirations and commitment of the people of Kenya to build a government based on the values of human rights, social justice and the rule of law as stated in its Preamble, the Constitution upholds the democratic principle of equality and freedom from discrimination on the grounds of sex, age, disability, ethnic or social origin, amongst others. It guarantees the right to equal protection and benefit of the law for women, men, youth, and Persons with Disabilities (PWDs) as the legal basis for the realisation of the potential of all the people of Kenya. To further safeguard full and equal enjoyment of all civil and political rights, the Constitution commits the State of Kenya to affirmative action measures through the implementation of the two-thirds gender principle. In accordance with this principle, not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. The adoption of the two-thirds gender principle is in line with the spirit of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The 2010 Constitution establishes Kenya as a multi-party democratic state resting on a presidential system of government in which executive power is vested in the president. The president exercises such power with the assistance of the deputy president and cabinet secretaries. Legislative power

lies in the hands of a bicameral Parliament shared by the National Assembly and the Senate. The Kenyan state is founded on a system of devolution of certain powers from the national government to the 47 county governments in specific sectors defined in the Fourth Schedule of the Constitution.

The 2011 Election Act and the 2016 and 2017 Election Law Amendment Acts regulate the management and conduct of the general elections at national and county levels. The Electoral Code of Conduct is contained in the 2011 Elections Act. The Act and its subsequent amendments provide detailed rules for the exercise of the right to vote, voter registration, voters' roll inspection, nomination of candidates, voter education, the deployment of the integrated electronic electoral system, media airtime allocation during political campaigns, determination and declaration of election results, election offences, and election dispute resolution.

The 2011 Act provides for the use of technology in the electoral process. Section 44 requires the EMB to establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The EMB is required to transmit results simultaneously from the polling station to the tallying centre at constituency and national levels. The EISA PAM was informed by stakeholders consulted of several amendments, proposed by the election management body (EMB), to the Elections Act. The EMB submitted five pieces of amendment law before the National Assembly.² The proposed changes sought to remove the legal requirement for electronic transmission of election results. The EMB also proposed that tallying centres at the constituency or county level shall be legally authorised to reopen ballot boxes if need be. At the time of the EISA PAM visit in Kenya these proposed amendments were still under consideration by Parliament. Concerns over the adverse effects of the pending review of legal reforms by Parliament, and potentially ensuing late changes to the legal framework reverberated through the EISA PAM's consultation with most stakeholders met. These

concerns echoed the cautionary statement made by some international election observer groups in their assessment of the legal framework for the 2017 elections. Based on media reports, the mission was informed of the National Assembly's rejection of the proposed amendments.

The 2016 Elections Offences Act buttresses existing rules in the 2011 Elections Act by providing specific details about the scope of electoral offences. These offences pertain to voter registration, multiple registrations of voters, voting, maintenance of vote secrecy, impersonation, bribery, and undue influence, among others. Offences committed by members and staff of the IEBC also fall within the purview of this legislation. The Act provides penalties for breach of the Electoral Code of Conduct and general penalties for breach of the Act. These penalties range from imprisonment to a fine and ineligibility for election or nomination in an election for a period of five years following the date of conviction.

The 2011 Political Parties Act regulates the formation, operations, financial administration, and reporting of political parties as well as intra- and inter-party dispute resolution in Kenya. The EISA PAM was informed by electoral stakeholders consulted of the 2021 amendments to the Political Parties Act passed by the National Assembly on 5 January 2022. Changes relate to the definition of the term political party; methods of conducting internal party nominations; political party publication and filing of their internal nomination processes with the Office of Registrar of Political Parties (ORPP); establishment by ORPP of a political parties' management information system; powers of ORPP in respect of political party records; and restrictions on party-switching. With the inclusion of a coalition political party in the definition, the amendment law has created a second form of coalition distinct from the other type of coalition previously practised in Kenyan politics. The mission noted that the emergence of the coalition political party has afforded a legal opportunity to existing political parties to legalise electoral pacts agreed upon at party leadership level. The requirement

²They include the Draft Elections (Registration of Voters) (Amendment) Regulations, 2022; the Draft Elections (General) (Amendment) Regulations, 2022; the Draft Elections (Voter Education) (Amendment) Regulations, 2022; the Draft Elections (Party Nominations and Party Lists) (Amendment) Regulations, 2022; and the Draft Elections (Technology) (Amendment) Regulations, 2022.

that political parties publish and file their internal nomination processes is a positive step which will contribute to strengthening internal transparency and accountability mechanisms of political parties. Considering the protracted nature of Kenyan politics, the EISA PAM is of the view that the indirect party nomination model poses a risk to open and participatory competition within parties and to intra-party democracy strengthening. Some stakeholders met by the mission expressed concerns about the long-term effects of indirect party nomination for the consolidation of electoral democracy, bearing in mind the place of elite pacts in Kenyan politics.

Against this background, the EISA PAM noted that the forthcoming general elections in Kenya will be held on the basis of the same constitutional and legal arrangements as for the 2017 elections. This is because no significant proposed electoral reform laws with implications for election administration, besides the Political Parties Amendment Act, were passed in the two months up to election day. The EISA PAM is of the view that the constitutional and legal framework largely provides sufficient and sound legal grounds for active public participation in the forthcoming general elections. Considering the time-bound nature of electoral operations, the Supreme Court's indictment of credible administration of the 2017 general elections and growing speculation about the capacity of the electoral authority, the EISA PAM is concerned about the electoral law reforms that were still under Parliament's consideration up to the time they departed from Kenya on 28 May 2022. If approved, last-minute changes to the legal framework will have ripple effects on the capacity of the IEBC to constitutional and legislative timelines for the conduct of credible elections. Similar concerns were previously echoed by other election observer groups in their assessment of the 2017 general elections.

4.2 ELECTORAL SYSTEM

The Constitution provides for the election of the president, members of the National Assembly, members of the County Assemblies, county women members of the National Assembly, senators, and governors.

The president of the Republic is elected directly by the registered electorate based on a two-round majoritarian system. A presidential candidate is elected if he or she successfully garners 50% + 1 vote of the valid ballots cast and at least 25% of the votes cast in each of more than half of the counties i.e., 24 of the 47 counties. If no candidate secures an absolute majority, a run-off election is held pitting the top two candidates with the highest votes in the first-round election. The president is elected for a maximum of two terms in office. Members of the Senate and the National Assembly are elected on a hybrid electoral system combining a single-member constituency majoritarian system and a closed-list proportional representation system to ensure the inclusion of special interest groups, including the youth, persons with disabilities and women.

The Senate consists of 68 members of whom 47 are elected in single-member constituencies based on the First-Past-The-Post simple majority system; 16 women members are nominated by political parties according to their proportion of members elected in the Senate; two members, being one man and one woman, represent the youth; two members, being one man and one woman, represent persons with disabilities (PWD); and the Speaker, an ex-officio member. The National Assembly consists of 350 members of whom 290 are elected in single-member constituencies based on the First-Past-The-Post simple majority system; 47 women members are elected in single-member constituencies; 12 members are nominated by parliamentary political parties according to their proportion of members of the National Assembly to represent special interests including the youth, PWDs; and the Speaker, who is an ex-officio member.

Stakeholders from civil society met by the EISA PAM generally expressed satisfaction with the inclusive character of the electoral system. The EISA PAM is of the view that Kenya's hybrid electoral system reflects the constitutional principles of the freedom of citizens to exercise their political rights spelt out in Article 38 of the Constitution, fair representation of persons with disabilities, and the two-thirds gender rule applied to elective public bodies. Application of affirmative action measures for women and PWDs is a positive step towards increased representation of these politically disadvantaged groups. The

EISA PAM is, however, concerned about effective implementation of the two-thirds gender principle because some political parties prioritised the indirect candidate nomination model and internal consultations over direct party nomination.

4.3 ELECTION ADMINISTRATION

The Constitution of the Republic of Kenya Article 88(1), establishes the Independent Electoral and Boundaries Commission (IEBC). In accordance with Article 88(4), the body is mandated to conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an act of Parliament. The 2012 Independent Electoral and Boundaries Commission Act further regulates the appointment of the chairperson, other members, and the secretary of the commission, as well as the powers, responsibilities, functions, and operations of the commission. Section 11 of the Independent Electoral and Boundaries Commission Act provides for a secretariat of the commission, headed by a secretary recruited through an open, transparent, and competitive process. The commission relies on the secretariat for the execution of day-to-day administrative functions of the commission and implementation of the policies and strategies formulated by the commission. The IEBC at national level is supported by election offices at constituency and county levels.

In accordance with Article 250(4) of the Constitution and Section 6 of the Independent Electoral and Boundaries Commission Act, the commission consists of a chairperson and six other members appointed by the president of the Republic with the approval of the National Assembly. At least six months before the lapse of the term of the chairperson or member of the commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the commission under the 2010 Constitution or the Independent Electoral and Boundaries Commission Act, the president of the Republic shall appoint a selection panel for the appointment of the chairperson or member of the commission. Section 5 of the First Schedule of the Act stipulates that the selection panel, the National Assembly,

and the president of the Republic shall ensure regional balance and that not more than two-thirds of the members are of the same gender when short-listing, nominating or appointing persons as chairperson and members of the IEBC.

Once appointed, the members of the commission serve on a full-time basis for a single term of six years and are not eligible for re-appointment. The Act, in Section 7, stipulates that the commission shall be properly constituted notwithstanding a vacancy in its membership. Four positions within the commission were left vacant following the resignation of four commissioners after the 2017 general elections. In early September 2021, the president of the Republic endorsed the appointment of four new commissioners following Parliament's approval of the nominees selected by the IEBC selection panel. A petition challenging the appointment of the new commissioners was submitted before the High Court on grounds of non-compliance with the two-thirds gender rule, and also because one of the nominees vied for a parliamentary seat during the 2017 general elections. The court case was still pending up until the mission's departure from Kenya.

Article 88(4) of the Constitution and Section 4 of the Independent Electoral and Boundaries Commission Act set out key functions of the IEBC as follows: continuous registration of citizens as voters; the regular revision of the voters' roll; the delimitation of constituencies and wards; the regulation of the process by which parties nominate candidates for elections; the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results; the registration of candidates for election; voter education; the facilitation of the observation, monitoring and evaluation of elections; the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election; the development of a code of conduct for candidates and parties contesting elections; the monitoring of compliance with the legislation required by Article 82(1)(b) relating to nomination of candidates by parties; and the use of appropriate technology and approaches in the performance

of its functions. The Constitution safeguards the security of tenure of IEBC commissioners whose removal is subject to a petition lodged before the National Assembly and a court of law.

The EISA PAM noted that the Supreme Court's ruling on the integrity of the 2017 electoral process left an indelible mark on public perception of the IEBC as a credible, open, and capable electoral authority. The mission's interlocutors had mixed views about the IEBC's state of preparedness and capacity to deliver transparent and credible elections. Stakeholders consulted by the mission generally recognised trust-building efforts of the IEBC towards other key election stakeholders through the various engagement platforms established by the commission. A few interlocutors of the EISA PAM also expressed satisfaction with the fairly good level of progress made with operational preparations and procurement. The IEBC has reportedly completed the procurement of about 95% of election materials. The human capacity of the IEBC has increased with the full complement of the commission leadership, recruitment of critical technical and directorate personnel, recruitment and training of county coordinators, and gazetting of returning officers. A few interlocutors of the mission consider the IEBC chairman's experience and technical aptitude to be an enabling factor. At the time of the EISA PAM's visit in Kenya the IEBC was reportedly in the process of recruiting half a million polling personnel for the management of election day activities.

Though all the mission's interlocutors acknowledged the work being carried out by the IEBC, the EISA PAM perceived discontent among some stakeholders, particularly civil society actors, at irregular communication from the electoral authority. Heavy bureaucracy within the IEBC was given as one of the reasons for the IEBC's irregular communication. Weak levels of communication have contributed to diminishing levels of trust in the IEBC as a competent and transparent electoral authority. Certain interlocutors also acknowledged the financial constraints besetting public institutions, including the IEBC whose election budget reportedly amounts to Ksh46 billion (approximately USD 400 million). Some of them were particularly concerned about

the channelling of development assistance funding through the Government, and implications of the funding model for electoral support to the IEBC and other actors.

Section 22 of the 2017 Elections Technology Regulations stipulates that the IEBC, in collaboration with a telecommunication network service provider or providers, put in place the appropriate telecommunication network infrastructure to facilitate the use of election technology for voter validation and results transmission, and shall publish the network coverage at least 45 days before the date of a general election. Furthermore, Section 8 of the aforementioned regulations requires the IEBC to carry out timely end-to-end testing of election technology before deployment for the election process. The EISA PAM was informed of the IEBC's plan to increase the total number of polling stations to 53 000. At the time of the EISA PAM's visit in Kenya the list of polling stations was yet to be gazetted by the IEBC. Proposed electoral law reforms by the IEBC pertaining to electronic transmission of election results and other shortcomings noted in previous elections were still pending at the level of Parliament. Some interlocutors expressed concerns about the likelihood of network coverage loss at some polling stations, bearing in mind the incident during the 2017 elections when the IEBC could not electronically transmit the results from 11 000 polling stations that were without 3G mobile network coverage. This lingering concern is further fuelled by an IEBC warning to Parliament about 11 000 polling stations that lacked 3G mobile network coverage up to March 2022. Based on ongoing analysis of broadband connectivity and network coverage, the Communication Authority of Kenya (CAK), a public institution with a facilitative role in the electoral process, expressed cautious optimism to the EISA PAM regarding the reduction in the number of polling stations without network coverage. The CAK has reportedly advised the IEBC to deploy alternative technology in areas without 3G/4G mobile network. The EISA PAM was informed, by certain interlocutors, of the possible use of IEBC-owned satellite phones in the eventuality of a lack of mobile network coverage in affected polling stations.

Regrettably, the EISA PAM could not engage the IEBC on its operational plans for the forthcoming general elections. The mission's official requests for a meeting were left unanswered by the commission. Based on the legal review, the EISA PAM is of the view that the institutional framework for election administration in Kenya guarantees the principle of institutional and some level of fiscal independence of the election authority in line with Kenya's international and regional commitments. Against the backdrop of its engagements with stakeholders met in Kenya, the EISA PAM is of the view that the results management and transmission system is one of the most critical and contentious issues ahead of the forthcoming general elections. Pending substantive legal reforms with a direct bearing on the electoral process will continue to fuel negative public speculation over the credibility of the forthcoming elections within an electoral context deeply marked by the legal precedent set by the ruling of the Supreme Court in 2017. The EISA PAM is also of the view that as the country approaches election day the IEBC should continue to strive for sustained engagement with other stakeholders in a consistent manner. The prospect of a late passing of electoral reforms that will not provide sufficient time for inclusive and broad-based consultations around the implementation of these changes would necessitate increased communication and transparency from the IEBC. These trust-building measures will contribute to easing the tension around public perception of the IEBC and its state of preparedness for the elections.

5. KEY FINDINGS ON THE PRE-ELECTION PHASE

5.1 VOTER REGISTRATION

The legal framework for voter registration provides that the necessary administrative arrangements should be made for the registration of voters as the basis for the realisation of the right to vote. Article 38(3)(a) of the Constitution, under the political rights section, guarantees the right of every adult citizen to be registered as a voter. To be eligible to vote, a citizen shall be 18 years old, hold a valid

identification document (an ID card or a passport), be of sound mind, not have been declared bankrupt and not to have been found guilty by an election court or reported to be guilty of any election offence during the preceding five years. Article 88(4) of the Constitution and Section 4(a) mandates the IEBC to undertake continuous registration of citizens as voters. The IEBC carries voter registration on an ongoing basis at the level of its constituency offices and through mass registration drives conducted at voter registration centres in an election year. The Electoral Act makes provisions for citizens to register to vote until 60 days before the election date. The legal framework makes provisions for the progressive registration of Kenyans living abroad as the basis for the progressive realisation of the right of the diaspora to vote.

Section 44 of the Election Laws (Amendment) Act of 2016 provides for the establishment of an integrated electronic electoral system referred to as the Kenya Integrated Election Management System (KIEMS). The system enables biometric voter registration by the IEBC. The commission is legally required to capture biometric data, alphanumeric data, and pictures of the applicants through use of the KIEMS.

The IEBC carried out mass voter registration (MVR) drives in late 2021 and 2022 with a target of registering 6 million new voters nationwide. The mission was informed of a lawsuit filed in early November 2021 by the IEBC to challenge the legal provision of continuous voter registration on grounds of financial constraints. The EISA PAM was informed by stakeholders met of the suspension of the voter registration process on 4 May 2022. Certain interlocutors were concerned about the lack of prior communication from the IEBC on the suspension. The suspension was reportedly needed to grant sufficient time for the verification of particulars by registered voters.

Following the mass registration drives, the provisional register had 22,152,441 voters. The EISA PAM noted an increase of 2,541,018 new voters from the total number of 19,611,423 voters registered for the 2017 elections. The 2022 figure increment is half the increment of 5,222,642 new voters recorded for the 2013 elections during which a

total 14,388,781 voters registered to vote. Based on these figures, the mission noted that the IEBC did not meet the 6 million-target. The figure corroborates the concern expressed by the mission's interlocutors about the lack of mobilisation and interest of the youth in these elections, due to unmet expectations and high unemployment levels among young people. The EISA PAM noted that the provisional voters' register was not disaggregated by age and gender.

The law requires the IEBC to open the voters' register not later than 60 days before the date of a general election for verification of biometric data by members of the public at their respective polling stations, for a period of 30 days. The IEBC is also required to revise the register to consider any changes in particulars arising out of the verification process upon the expiry of the period for verification by registered voters. The IEBC made a provision for voters to check and verify their registration details via SMS. The EISA PAM is of the view that this provision makes the verification process less cumbersome and more accessible for registered voters. However, interlocutors of the EISA PAM noted with concern the low mobilisation of citizens during the time of inspection of provisional voters' lists. The EISA PAM noted that none of its interlocutors raised an issue about the accuracy of the provisional voters' register.

At the time of its visit, the EISA PAM was informed by its interlocutors of an independent audit of the voter's register which was being undertaken by KPMG in line with the Elections Act requiring a full and independent audit of the voter register, and the IEBC to follow up on recommendations within 30 days.

5.2 POLITICAL PARTY REGISTRATION AND CANDIDATE NOMINATION

5.2.1 Political party registration

Registration of political parties is provided for through the Political Parties Act of 2011, as amended in 2015 and 2021, which stipulates the registration and regulation of political parties, funding and accounts of political parties,

the establishment of the Office of the Registrar of Political Parties, the establishment of the Political Parties' Disputes Tribunal, and general provisions on winding up parties, offences and penalties and transitional provisions. The Act also provides for a code of conduct for political parties, basic requirements for coalition agreements, and provisions for the appointment of the Registrar and the Assistant Registrars of political parties.

Article 19 of the Kenya Constitution outlines stringent requirements for the registration of political parties, such as having a national outlook, established offices in more than half of all the 47 counties, a thousand members per county, and ethnic inclusivity in the leadership structure. At the time of the EISA PAM, a total of 89 parties had been registered compared to 60 that had been registered for the 2017 elections. The Office of the Registrar of Political Parties (ORPP) indicated that over a thousand applications had been received but the majority of applicants had failed to meet the requirements. Those that failed to meet the criteria were allowed to appeal.

According to the Political Parties Amendment Act of 2022, the ORPP also has powers to register coalition agreements for coalition parties 120 days before the elections. The requirements for the registration of coalition parties include the names of the parties forming the coalition, the organisational structure of the coalition, nomination rules of the coalition party, areas in which the coalition intends to contest, sharing of funds, and how disputes will be resolved. Upon submission of all requirements, the ORPP then issues the coalition party with a certificate of full registration.

Section 28A of the Electoral Act of 2011 states that political parties must submit party member lists to the ORPP two weeks before the deadline for submission to the IEBC. In order to be nominated to stand for election, a prospective candidate must be a registered member of a political party by the date of submission of the party list to the ORPP. The party lists are used by the ORPP to certify the party register which will be used during party candidate nomination processes.

Political parties in Kenya are allowed to nominate candidates through two processes, either through direct nomination or indirectly by allowing party members to elect candidates.

In terms of dispute resolution, Section 381 of the Political Parties Act provides for political parties to submit disputes arising from their nomination processes with their internal party dispute resolution mechanisms within 30 days of the nomination date. The Political Parties Dispute Resolution Tribunal (PPDRT) can only entertain disputes where evidence is shown that internal party remedies had been explored.

Regarding special seats, political parties in Kenya are required to submit party lists to the ORPP to certify that nominees on the party lists are members of the nominating party. Disputes arising from the certification of party lists will be addressed by the Political Parties Disputes Tribunal.

At the time of the EISA PAM, it was indicated that parties had submitted their rules for nomination of candidates to the ORPP, and some were certified as having complied with all requirements including the two-thirds rule. The ORPP also reported that they had monitored party primaries to ensure compliance with approved party rules, and the number of disputes arising from these internal processes had dropped drastically from 360 in 2017 to 115 in 2022. It was also indicated by the ORPP that more women were cleared to contest for elections by their parties than in previous elections, as a result of the intervention of the ORPP office. Additionally, the number of independent candidates cleared for the 2022 elections doubled compared to 2017, from 4 000 to 9 000.

The mission also noted that in the last three years, the ORPP had deregistered/suspended three political parties after which appeals were filed. As a result of the appeals process, one political party was reinstated. Parties had been deregistered/suspended for violating the code of conduct; but before such deregistration or suspension, warnings were issued to them to rectify or address the violations noted.

The major concern regarding the registration of political parties and nomination of candidates was the limited use of information communication technology. The ORPP regretted its technological limitations which made monitoring and verification of parties, members and candidates very cumbersome. Furthermore, it was highlighted that political parties and candidates did not trust the technology deployed and preferred to file their papers manually. During its visit, the PAM team witnessed hundreds of candidates queuing at the ORPP to file their papers. Interlocutors of the PAM were largely satisfied with the ORPP's role in the process.

5.2.2 Political party finance

Section 24 of the Political Parties Act sets up the Political Parties' Fund which is administered by the Registrar of Political Parties whose source is the government, and which should be 0.3% of the national revenue. The ORPP highlighted the fact that this allocation had not been fully received from Treasury since the establishment of the ORPP.

To qualify to receive funds political parties must have received at least 3% of all votes cast, must have 20 members of the National Assembly, 3 senators, 3 governors and 40 members of country assemblies.

The Political Parties Amendment Act of 2022 introduced new guidelines for the qualification and use of funds received through the Political Parties Fund. Political parties cannot access the fund if two thirds of its registered office bearers are of the same gender, if the party does not have any representation of special interest groups, and if the party does not have representation in the National Assembly, the Senate, a governor or a member of a county assembly.

In terms of the distribution of funds, 70% of the allocation is distributed proportionately based on the number of votes received by the parties in the preceding elections. Fifteen per cent is distributed in proportion to the number of special seats won by the qualifying parties in the preceding election. Ten per cent is distributed proportionately to

the total number of elected representatives secured in the election, while five per cent is used by the ORPP to administer the fund.

The EISA PAM discovered that only Jubilee and the Orange Democratic Movement (ODM) had qualified to access the fund based on the last election cycle. Funds were said to have been disbursed to the two parties based on a work programme prepared by the parties and approved by the ORPP. All funds disbursed were subject to auditing by the Auditor-General and annual returns were submitted to the ORPP.

In Kenya, there are restrictions on the private funding of political parties; for example, an individual cannot contribute more than 50% of the operating budget of a party.

5.3 VOTER EDUCATION

Section 4(g) of the Independent Electoral and Boundaries Commission Act of 2011 includes voter education as part of the mandate of the commission. The Voter education Regulations of 2017 proceed to outline the role of the commission in the provision of voter education, voter educators and the accreditation of voter education providers in Parts 2, 3 and 4.³

In discussions with election stakeholders, the EISA PAM confirmed that the IEBC conducted voter education in the pre-election phase of the electoral cycle. Such education was targeted at voter registration and largely included dissemination of information pertaining to what was required in order to register to vote, and to vote. It was also acknowledged that the IEBC used voter educators deployed physically and the media in conducting voter education.

Some voter education service providers were of the view that the IEBC approach to voter education and sensitisation was, however, conservative, and lacked appeal for the youth who access information online. The

IEBC was described as passive and limited in terms of building public confidence in the electoral process.

To complement the voter education conducted by the IEBC, the commission also accredited voter education providers which included civil society organisations. Several groups accredited as voter education providers confirmed that they received voter education materials from the IEBC and their accreditation process was largely seamless. Youth organisations indicated that they used virtual spaces to disseminate information about the electoral process and to mobilise citizens to participate in voter registration. It was explained that the use of virtual spaces allowed the groups to access a wider constituency at lower costs compared to physical interactions with young people.

Other voter education providers engaged during the PAM explained that their approach to voter education was targeted at hot spots likely to be most affected by election-related conflict, and the focus in these areas was peace messaging.

Special interest groups accredited as voter education providers suggested that they faced two challenges in the discharge of their work, namely limited knowledge of the law by citizens, and the late promulgation of laws which contributed to a vague appreciation of the laws by voter educators themselves. It was stated that these challenges made voter education difficult for voter educators at grassroots level where they had to constantly check with the IEBC as to the formal position on some issues.

Despite extensive voter education by voter education providers and the IEBC, it was revealed that voter registration levels remained lower than anticipated. It was suggested that some of the factors that contributed to low responses to voter registration, regardless of the voter education conducted, was that questions raised about the 2017 elections had not been fully addressed. Some stakeholders met by the PAM suggested that the youth believed that the elections would not benefit

them in any way since they felt left out of the process as candidates and leaders. It was felt that politics continued to benefit the same groups with every election and there was nothing in it for the youth.

Another factor affecting voter education was said to be limited resources. Stakeholders engaged during the PAM indicated that they had faced challenges in receiving funding from donors to conduct voter education in time. There were allegations that the government had influenced delays in the disbursement of funds to some groups, although no evidence to support this was shared. Other groups met by the PAM also alleged that donors had opted to fund a few groups for elections and requested that smaller organisations should partner with the more established groups to access funding. Such an approach was said to have limited the capacity of the smaller groups to access funds and, by extension, to implement comprehensive voter education to the best of their abilities.

5.4 CIVIL SOCIETY

Public participation rights enshrined in the Constitution provide a sound legal basis for civil society's active role in public affairs in Kenya. Civil society has, over the decades, been renowned for its robust engagement in public affairs and elections in particular. Discussion by the EISA PAM with several civil society organisations (CSOs) revealed a certain level of civic engagement in the forthcoming elections.

Based on its consultation, the mission noted that CSOs were undertaking interventions in civic and voter education; women's political participation; citizen election observation and monitoring; parallel vote tabulation (PVT) for the presidential election; capacity- strengthening of key actors; youth political participation, peace promotion, mediation and peace-building; electoral violence and conflict mitigation; conflict-sensitive media reporting; conflict and violence prevention in partnership with the National Cohesion Integrity Commission (NCIC); media and hate speech monitoring; gender-based violence (GBV) and women's access to justice; monitoring of

human rights and GBV violations by state actors and law-enforcement agencies; and election dispute resolution (EDR) and technical support to institutions.

The EISA PAM was informed of an electoral cycle-based assessment and monitoring initiative carried out by the election observer group (ELOG), an umbrella body consisting of local organisations. The mission noted the deployment of 297 recruited and trained long-term observers (LTOs) by the group across Kenya's 290 constituencies since February 2022. The EISA PAM was informed that the LTOs were assessing the process based on various thematic areas, including mass voter registration, political party nomination, electoral violence, and use of public resources. ELOG plans to deploy 6 000 observers to conduct general observation on election day, and conduct a PVT in all 290 constituencies. At the time of the visit of the EISA PAM, the group was planning to set up a situation room and launch a data centre.

The Electoral Law and Governance Institute for Africa (ELGIA), an organisation working in the area of constitutional democracy and electoral processes, is providing capacity-strengthening support in the area of EDR to the Supreme Court, magistrates, and the Political Party Dispute Resolution Tribunal, and providing technical assistance to various institutions, including the judiciary, the Office of the Registrar for Political Parties (ORPP), the Judicial Commission on Elections, and the IEBC.

The National Council of Churches in Kenya, another umbrella of CSOs, supports the ongoing process in the area of peace promotion in 18 counties and dialogue amongst the political leadership.

Act, Change and Transform (ACT), a local development agency, is playing a role in this year's elections specifically in the area of electoral violence and conflict mitigation, and civic and voter education targeting special interest groups, including women, youth and PWDs. The agency's focus on mitigation entailed strengthening local peace structures through the National Steering Committees and other existing structures.

³ Kenya Gazette Supplement No 63, Legislative Supplement No 29, Legal Notice No 70, The Elections (Voter Education) Regulations, 2017

The mission was also informed of efforts by women's organisations in the area of legal and capacity-building support to female political aspirants, as well as efforts by youth organisations to sensitise and mobilise the youth around the electoral process. Youth organisation initiatives are largely online engagements related to peace messaging and youth participation in the elections.

Most interlocutors from civil society met by the EISA PAM expressed concerns about the shrinking civic space marked by the absence of public participation laws at county level, the deregistration of local NGOs witnessed in 2017 and 2018, and scarce donor funding for electoral support. Certain civic groups met by the mission had funding beyond the 2022 elections. The EISA PAM noted with satisfaction the active participation in the electoral process of several civic groups, notwithstanding the shortage of donor funding.

5.5 PARTICIPATION OF WOMEN

Women participation in Kenya's public affairs is founded on the principle of equality before the law, the right to equal treatment and equal opportunities in the political sphere, and the principle of non-discrimination based on gender, guaranteed respectively by Articles 27(1), 27(3) and 27(4) of the Constitution. Article 56 of the Constitution enjoins the state to put in place affirmative action programmes for the participation and representation of marginalised groups in governance and other spheres of life. Section 81 of the supreme law further stipulates that not more than two-thirds of the members of elective public bodies shall be of the same gender. Interlocutors of the EISA PAM were generally satisfied with the legal framework for the political participation of women.

Women constitute 50.3% of Kenya's total population of 54,985,702 million.⁴ Based on the outcome of the 2017 parliamentary elections, women's representation in the National Assembly stood at 21.4% and 30.9% in the Senate.⁵ The level of women's representation in the lower chamber was below the average for Sub-Saharan

Africa (26.1%) and East Africa (31.9%). Kenya fares marginally better in terms of women's representation in the upper chamber of Parliament when considering the average score of 25.3% for the Sub-Saharan region and 30.3% for East Africa. Based on the global ranking of the Interparliamentary Union, Kenya is ranked 106 in a list of 183 countries. Three women sit on the bench of the Supreme Court in Kenya with the Chief Justice and the Deputy Chief Justice being women. The mission noted that 29.1% of the cabinet are women, with seven women out of twenty-four members. The IEBC includes two women, the vice-chairperson and one commissioner.

The IEBC is constitutionally and legally mandated to regulate the process by which parties nominate candidates for elections, and to register candidates for election. The EISA PAM was informed that the IEBC extended the candidate nomination list submission date from 28 April 2022 to 09 May 2022 for political parties that were not compliant with the two-thirds gender rule. The mission was also informed that the IEBC further extended the date to 12 May 2022 following the review of the resubmitted lists, to accommodate political parties that failed to resubmit the nomination lists on time. This measure was in line with the constitutional provision in Article 83(3) requiring the electoral authority to make administrative arrangements for the conduct of elections that shall be designed to facilitate, and shall not deny, an eligible citizen the right to stand for election. The mission was equally informed of the warning issued by the IEBC to political parties whose revised nomination lists did not meet the two-thirds gender principle past the second extension date. These political parties faced the risk of outright rejection of the entire nomination lists. The High Court in its ruling in the case of Adrian Kamotho Njenga versus the IEBC ordered the suspension of the implementation of the two-thirds gender principle in the nomination of candidates for general elections on 9 August 2022.

The EISA PAM noted that two of the 17 presidential hopefuls that registered with the IEBC were female. Dorothy Kemunto Nyangori and June Juliet Munyeki

registered as independent candidates. At the time of the mission's visit to Kenya, the IEBC was in the process of finalising the registration of presidential candidates and political parties' submission of candidate lists for the National and County Assembly elections with the deadline of 25 June 2022. The nomination of Martha Karua, as the running mate of Raila Odinga on the presidential ticket of the Azimio La Umoja coalition party, had elicited great hopes from Kenyan women about women's prospects of assuming public leadership positions at the highest level of the executive branch. Female interlocutors of the mission regarded this nomination as a positive step in the right direction.

The EISA PAM is of the view that the constitutional and legal framework for democratic elections in Kenya is largely conducive to the enjoyment of equal opportunity for women and men. Specific legal provisions related to women's participation are largely in line with Kenya's international and regional obligations and commitments to inclusive electoral processes. The mission is also of the opinion that the constitutional provision of the two-thirds gender rule is compliant with the African Charter on Democracy, Elections and Governance, which commits state parties to promoting gender balance and equality in the governance and development processes. Notwithstanding the gradual increment in female parliamentary representation registered in the last two elections, held against the backdrop of the two-thirds gender principle, the EISA PAM is of the view that progress has been partly decelerated by the absence of legislation for the effective implementation of the two-thirds gender rule. Certain interlocutors of the mission expressed concerns about the candidate nomination process in some political parties and implications for the implementation of the gender rule. The mission was informed by a women's association that some male aspirants were chosen in preference to their female counterparts as a result of intraparty consensus-building around candidate tickets. In addition to not being able to exercise their right to stand in the election, several women were reportedly not reimbursed for their nomination fees in a context where access to financial resources by women is a real challenge. The association also informed the mission of a spike in the

number of cases of gender-based violence (GBV) during political party primaries, based on GBV monitoring. Cases of violence reported by women aspirants took the form of intimidation, harassment, physical and virtual (online) attacks. The EISA PAM was informed by some interlocutors of cases brought before the Political Party Dispute Tribunal and Magistrate Courts. The filing fee for lodging a case before a Magistrate Court was reported by certain interlocutors to be a major hindrance to women aspirants' hope for legal redress and their right to access justice.

5.6 MEDIA ENVIRONMENT

Freedom of expression, freedom of the media and the right of access to information are guaranteed by the Constitution in Articles 33, 34 and 35 respectively. The media has a central role in any electoral process and the situation is no different in Kenya. The media sector in Kenya is very diverse and inclusive of different types of both mainstream and new media, whose interventions and conduct are regulated by the Media Council of Kenya (MCK). The EISA PAM engaged with media stakeholders assessing the media environment ahead of the election, considering elements of information dissemination, communication, and monitoring. The media plays a pivotal role in Kenya's elections, and is emphasised in the Electoral Act, particularly the code of conduct.

Stakeholders engaged during the PAM indicated that much effort had been made in building the capacity of the media to ready it for the August 2022 general elections. Such training had been preceded by a comprehensive needs assessment of media houses and a review of the recommendations made by observers in the 2017 elections. The training targeted both journalists and editors and was aimed at curbing biased election reporting. It was indicated that the trainings had started as early as November 2021, well in time for the August 2022 elections.

The mission learnt that the state media appeared to be more professional than private media in their reporting on the elections. The explanation given for the differences

⁴ <https://data.worldbank.org/indicator/SPPOPOTOTL?locations=KE> accessed in June 2022.

⁵ The data is from the Interparliamentary Union on Kenya's national parliament https://data.ipu.org/content/kenya?chamber_id=13439

in the quality of reporting was said to be the ownership structure, with politicians having a stake in most of the privately-owned media houses.

In terms of press freedom, some stakeholders indicated that Kenya had nearly 21 legal provisions against media freedoms, regardless of the country ranking favourably in terms of overall media freedoms on the continent and in the world.

The PAM also learnt that the Media Council of Kenya was working with other stakeholders to monitor the media and to address issues of unbalanced coverage, biased reporting, misinformation, and disinformation being spread online, as well as in mainstream media.

It was observed that there had been a spike in the number of complaints received about the conduct of the media in the pre-election phase of the election cycle. Many of the complaints related to misinformation, disinformation, and biased reporting.

The fight against hate speech in the context of the 2022 general election has been spearheaded by the National Cohesion and Integrity Commission (NCIC), a statutory body mandated to promote harmony and peaceful co-existence between persons of the different ethnic, racial and religious communities of Kenya. Based on its roadmap to peaceful 2022 general elections, the NCIC has been engaging political actors, the media, and community influencers to eliminate hate speech. This has been noted as mainly online, fake news, misinformation, and ethnic incitement, that accentuate the prevailing negative cultural and ethnic differences. As part of its efforts to monitor hate speech in the election, the NCIC developed a speech lexicon of about 23 words deemed provocative when used in different language contexts. Some interlocutors of the EISA PAM noted a certain reduction in the level of hate speech, particularly by political leaders. The decline was attributed to the NCIC's approach which entails perpetrators writing on the wall of shame and the wall of fame, social media monitoring, and working with bloggers. With campaign activities increasing there were also indications that hate speech was on the rise. Some interlocutors of the EISA PAM shared reports of

cases of hate speech and online violence against female contestants.

5.7 CAMPAIGNS AND CAMPAIGN FINANCING

5.7.1 Campaign conduct

Election campaigns are regulated through the Electoral Code of Conduct which is found in the Second Schedule of the Electoral Act. The code of conduct also binds political parties, candidates and the media and is enforced by the IEBC through an Electoral Code of Conduct Enforcement Committee which comprises five commissioners chaired by a member appointed by the chairperson of the IEBC.

The IEBC is also tasked with establishing peace committees in every constituency, with powers to reconcile warring parties, mediate political disputes, liaise with government security agencies, and report any violations of the code of conduct to the enforcement committee.

The EISA PAM was informed that political parties in Kenya are allowed to 'popularise' their manifesto. As witnessed and confirmed by election stakeholders engaged during the PAM, campaigns for the August 2022 general elections unofficially commenced as early as December 2021. Raila Odinga, for instance, announced his candidature on 10 December 2021, followed by William Ruto's United Democratic Alliance announcing a political pact with the Amani National Congress, FORD-Kenya and others in January 2022. By February 2022, Uhuru Kenyatta's Jubilee party had announced that they would be joining the Azimio coalition with ODM; and in March 2022, Wiper and KANU signed a cooperation pact endorsing Raila Odinga's candidature. According to reports, Uhuru Kenyatta publicly endorsed Odinga on 12 March 2022. Two days later, UDA and Kenya Kwanza endorsed Ruto as their presidential candidate.

By April 2022 Kenya had already started seeing popularisation activities in the form of rallies and billboards. These activities, explained by both Azimio and Kenya Kwanza as merely political activities aimed at raising citizen awareness of their parties, were also noted by stakeholders to be violent at times.

The PAM was unable to attend popularisation activities physically but followed these via the media. A large component of the campaigns was waged in the media through both public and private media houses. Social media was observed as particularly vibrant, as a campaign space with Twitter was being used extensively to communicate election manifestos and messages. Presidential hopefuls were observed travelling across the country and using public events for their engagements to garner support from the citizens, and key stakeholders such as the church and business.

According to stakeholders, including civil society groups and the media, campaigns also witnessed massive intimidation and abuse of candidates, particularly on social media. There were allegations of abundant and unrestrained use of hate speech and insults on social media particularly targeting women. There were also reports suggesting incitement to violence on the same platforms and at public rallies. While some were investigated and publicly condemned, most of them went unchecked owing to difficulties in identifying the perpetrators on social media, some of whom were not using their real names. At the time of the PAM there was a real concern that election-related violence could erupt owing to the political tensions arising from the highly competitive presidential election. All stakeholders insisted that security was their biggest concern ahead of the election.

Election campaigns in Kenya officially start after the nomination of presidential candidates. The deadline given by the IEBC for statutory requirements for presidential candidates to be met was 23 May 2022 and campaigns officially started on 29 May 2022, a day after the PAM left Kenya. As a result, the EISA PAM was unable to observe the start of the official election campaign.

5.7.2 Campaign finance

In terms of campaign finance, Kenya's Election Campaign Financing Act of 2013 is administered by the IEBC. The Act came into force after the 2017 general elections. Through this Act, the IEBC is mandated with powers to supervise authorised persons, candidates, and political parties in

relation to campaign expenses; set spending limits and enforce their compliance; verify sources of contributions to candidates and political parties; monitor and regulate campaign expenses; and advise candidates and parties on matters relating to campaign expenses.

Political parties and candidates have the responsibility to set up expenditure committees and to submit their names to the IEBC. They must also notify the commission if there are any changes to the names of persons on these committees. Furthermore, political parties must submit expenditure reports, starting with a preliminary nomination expenditure report, within 21 days of the political party nomination and a final expenditure report within three months of the election.

The Act also stipulates that the Commission shall gazette, 12 months before a general election, limits on total contributions, contributions by an individual source, paid-up media coverage, and loans forming part of a contribution. However, it was noted that the National Assembly rejected a proposal by the IEBC in August 2021 to legislate caps on campaign spending.

Anonymous contributions or support, whether in cash or kind, and contributions from illegal sources, should not be kept by a candidate or political party. Candidates and political parties are also prohibited from receiving funds from a state, a state institution, a public official or any public resource.

In terms of caps on campaign funding, a presidential candidate is allowed to spend a maximum of USD44 3 million while governors, senators and female representatives have a limit of USD3 69 million.

The PAM was unable to verify if political parties and candidates were complying with the provisions in the Election Campaign Financing Act in the absence of further regulations regarding campaign financing. Reports suggested that the National Assembly had been unwilling to approve proposed regulations to introduce further regulation of campaign funding.

The PAM was, however, able to ascertain through media reports that there had been a spike in the number of helicopters owned or leased by politicians in Kenya during the election period, according to the Kenya Civil Aviation Authority. It was further alleged that cash in circulation outside the banking system was at an all-time high in April 2022, having increased by USD2.14 billion compared to the previous month.

The EISA PAM is of the view that the absence of a comprehensive regulatory framework for campaign financing further exposes the country to the growing risk of further commercialising politics in Kenya. Candidates from marginalised and vulnerable groups, including women, youth and PWDs, are bearing the brunt of a playing field unlevelled by massive amounts of money in a context where politics appears to be a place for the financial haves.

5.8 PREPAREDNESS OF IEC TO CONDUCT ELECTIONS

The Independent Elections and Boundaries Commission (IEBC) is mandated with the administration of electoral processes through the IEBC Act of 2011 (as amended). Section 4 of the Act provides for the continuous registration of citizens as voters; the regular revision of the voters’ roll; the delimitation of constituencies and wards; the regulation of candidate nomination processes by political parties; the settlement of election disputes (excluding election petitions and disputes related to election results); the registration of candidates for elections; voter education; the facilitation of election observation; regulation of money that can be used by parties and candidates in an election; the development and enforcement of a code of conduct for parties and candidates in an election; and the use of appropriate technology in the discharge of its functions.

While the PAM’s interlocutors expressed reservations about the extension of resources and timing of financial support to the IEBC, there was general confidence in the body’s state of preparedness to administer the 2022 general elections. One concern that was expressed

unanimously by election stakeholders was the absence of effective communication on the part of the IEBC about its state of preparedness for the elections. While the IEBC and some of its technical partners disputed the allegation, there was an acknowledgement that the body could do more to inspire confidence about its state of preparedness beyond simply issuing statements. In one instance, it was suggested that the IEBC could also outline the successes it was scoring in terms of preparations for the polls in comparison to the same time ahead of the previous election.

At the time of conducting the PAM, stakeholders, particularly political parties, had started raising concerns about the transparency of the IEBC in relation to where ballot papers were being printed, the resolution of inaccuracies noted in the audit of the voters’ roll by KPMG, and the identity of intruders who were said to have attempted to tamper with the voters’ roll.

It can be concluded that while the election management body appeared to be on track in meeting its deadlines in terms of the election calendar, there was an obvious absence of stakeholder confidence in the state of preparedness at a qualitative level.

RECCOMENDATIONS

Target stakeholders	Ahead of the 2022 elections	For future elections
The Government	<ul style="list-style-type: none"> Disburse the requisite funding for effective implementation of the IEBC’s election operational plan in a timely manner. 	<ul style="list-style-type: none"> Take all the necessary facilitative measures for the full implementation of the two-thirds gender principle as a way of ensuring that Kenyan women enjoy to the fullest the right to equal opportunities in public affairs, in line with Kenya’s Constitution and international and regional commitments. Explore other ways of entrenching the independence of the IEBC by allowing it to mobilise its own resources across the election cycle without government interference. Guarantee the full disbursement for the Political Parties Fund to the ORPP.
Parliament	<ul style="list-style-type: none"> Fast-track the review of proposed amendment laws to prevent the tardy implementation and operationalisation of late electoral reforms not grounded in broad-based public consultation, and to help lessen the tension around the electoral process. 	<ul style="list-style-type: none"> Enact laws for the effective implementation of the two-thirds gender principle in order to uphold the right to equal treatment and equal opportunities for women and men in the political sphere, as enshrined in Kenya’s Constitution and prescribed by Kenya’s international and regional commitments. Legislate the enforcement of the 2013 Election Campaign Finance Act to contribute to a level playing field for all Kenyan political aspirants, and to further strengthen existing anti-corruption safeguards against the monetisation of politics and the use of public resources in electioneering in Kenya. Consolidate pieces of electoral regulations into a single electoral code for ease of legal referencing the electoral process. Pass regulations to cap campaign financing and to facilitate effective monitoring of the use of money in elections across the election cycle. Ensure government disburses the full amount set aside for Political Parties Fund in accordance with the law.

<p>IEBC</p>	<ul style="list-style-type: none"> • Intensify communication with other key stakeholders, especially civic and political actors, through and outside the confines of existing stakeholder platforms, to increase transparency on all aspects of the electoral process and to defuse tension around critical and sensitive electoral operations such as the electronic transmission of results. • Conduct a public pilot test of the electronic election results transmission component of the Kenya Integrated Election Management System. This is in order to allay stakeholders' lingering concern and doubts about the effective operationalisation of the electronic system in the forthcoming elections, as well as take all necessary corrective measures ahead of time which will help to boost public confidence in the administration of the forthcoming elections. • Provide clear, simple, and comprehensible guidelines on the election results transmission process to stakeholders. 	<ul style="list-style-type: none"> • Propose new political finance regulations. • Motivate timeously for funds to support the election cycle process. • Explore ways of building public confidence in its capacity to be independent, transparent, and accountable in the administration of elections. • Revise its voter education strategies to be less passive and more responsive to citizen concerns about the credibility of elections in Kenya.
<p>Political parties</p>	<ul style="list-style-type: none"> • Refrain from inciting and engaging in hate speech so as to preserve a climate of peace and social cohesion amongst communities during the election campaign, and to safeguard the human dignity of political opponents, including female aspirants. • Take firm action against cases of hate speech and gender-based violence against party personnel and members, with the aim of preserving a climate of peace and social cohesion promoted through efforts of the National Cohesion and Integration Commission and civil society. 	<ul style="list-style-type: none"> • Take all the necessary affirmative action measures to support the government in giving full effect to the realisation of women's political participation rights enshrined in the Bill of Rights for increased representation of women in party decision-making structures and elected public institutions. • Comply fully with reporting requirements around campaign funding. • Set up internal measures to curb, punish and discourage hate speech among its members.

<p>Civil society</p>	<ul style="list-style-type: none"> • Pursue constructive engagements with the IEBC in the lead-up to the elections with the aim of further contributing to the peacefulness, inclusiveness, transparency, and credibility of the forthcoming general elections. • Through the strategic partnership with the IEBC, intensify mass voter education and outreach campaigns targeting specially women, youth and PWDs to enhance the quality of participation of these special interest groups. • Continue to complement and support the peace and social cohesion building initiatives of the National Cohesion and Integration Commission for early detection, mitigation and prevention of election-related conflicts and non-election related conflicts at grassroots level in order to safeguard the peacefulness of the forthcoming elections. 	<ul style="list-style-type: none"> • Pursue advocacy for the adoption of a sound and comprehensive political finance regulatory framework for the sake of equitable and transparent political competition that includes the interests of all social groups, particularly women, youth, PWDs and minorities. • Review and revise voter education strategies to address citizens' limited confidence in elections. • Advocate for an expanded civic space that allows for them to sufficiently exercise their oversight function without fears of deregistration.
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ABOUT EISA

EISA has since its inception in July 1996 established itself as a leading institution and influential player dealing with elections and democracy related issues in the African continent. It envisions an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment. The Institute's vision is executed by striving for excellence in the promotion of credible elections, citizen participation, and the strengthening of political institutions for sustainable democracy in Africa.

Having supported and/or observed over 120 electoral processes in Africa, EISA has extensive experience in formulating, structuring and implementing democratic and electoral initiatives. It has built an internationally recognised centre for policy, research and information and provides this service to electoral management bodies, political parties and civil society organisations in a variety of areas, such as voter and civic education and electoral assistance and observation. Besides its expanded geographical scope, the Institute has, for the past several years, been increasingly working in new in-between election areas along the electoral and parliamentary cycle, including constitution and law making processes, legislative strengthening, conflict management and transformation, political party development, the African Peer Review Mechanism (APRM) and local governance and decentralisation.

EISA provides assistance to inter-governmental institutions like the African Union and Regional Economic Communities to reinforce their capacity in the elections and democracy field, having signed an MoU with many of these institutions. Within the framework of these signed memoranda, the Institute provides assistance to these intergovernmental institutions.

With offices in Johannesburg (South Africa) and Abidjan (Côte d'Ivoire), EISA has had field offices across the African continent and currently has offices in Central African Republic, Democratic Republic of Congo, Madagascar, Niger, Tanzania, Somalia and Sudan, and a regional liaison office at the secretariat of the ECCAS in Libreville, Gabon.

Election observation activities

Since its inception EISA has deployed continental observation missions including missions, notably to Angola (2008), Botswana (1999, 2004, 2009), Central African Republic (2010, 2011), Côte d'Ivoire (202) Democratic Republic of Congo (2005 referendum, 2006 elections), Egypt (2011, 2012, 2014), Ghana (2008, 2012), Guinea Conakry (2010), Lesotho (1998, 2002, 2007, 2012, 2015), Liberia (2011), Madagascar (2005, 2007, 2013), Malawi (1999, 2004, 2009), Mauritius (2000, 2005, 2010, 2014), Mozambique (1999, 2004, 2009, 2013, 2014, 2019), Namibia (1999, 2004, 2009), Senegal (2012), Seychelles (2011), South Africa (1999, 2004, 2009, 2014), Tanzania (2005, 2010, 2020), The Gambia (2021) Uganda (2011), Zanzibar (2005, 2010), Zambia (2005, 2008, 2011, 2015, 2020), and Zimbabwe (2000, 2002, 2008), Reports on these missions can also be found on our website.



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About EISA

EISA is a not-for-profit-organisation established in 1996 based in Johannesburg, South Africa with regional offices in Abidjan Côte d'Ivoire and Libreville, Gabon. EISA currently has and has had field offices in 20 African countries.

Our vision

An African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment.

Mission statement

EISA strives for excellence in the promotion of credible elections, citizen participation, and strong political institutions for sustainable democracy in Africa.

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