

**IMPLICATIONS ARISING FROM JUDICIAL RESOLUTION OF PRESIDENTIAL  
ELECTION DISPUTES IN KENYA**

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## **DECLARATION**

This project is my original work and has not been presented for a degree in any other University.

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## **DEDICATION**

To my mother Christine Musiga who has been a source of encouragement and pillar of support throughout my academic journey.

To all the voters who exercise their constitutional right to vote.

## ACKNOWLEDGMENT

A lot of effort went into the writing of this project. The many months of conceptualizing, thinking and eventually writing. However, the conduct of this study would not have been possible without the immense support I received from various people. Foremost, I wish to sincerely thank the Almighty God for the grace and strength to carry out this research study. Secondly, I wish to thank my supervisor Dr. Felix Kiruthu, and my original supervisors - Dr. Martin Atela and Dr. Nana Idun for their incisive comments, guidance, instructions and support. Their comments, patience and thoughtful insights are greatly appreciated without which this work would not have been possible. Alongside my supervisors I am also grateful to the entire faculty staff and students at the Department of Public Policy & Administration led by the Chairperson Dr. Felix Kiruthu, Mr. Apollo Muinde and Mr. Weldon Ng'eno whom all in very many ways also supported this study with their advice and guidance at various stages of the study. Thirdly, I am also grateful to my colleagues in the profession whom sometimes at no notice I approached to discuss my study with. Particularly, I am grateful to Mr. Muthomi Thiankolu, Dr. Conrad Bosire, Dr. Jullie Oseko, Mr. Duncan Okubasu, my colleagues at the National Council for Law Reporting and to all my relatives and friends. May God bless you all abundantly.

## ABSTRACT

In recent years, there has been a substantial increase in the filing of presidential electoral disputes for purposes of resolution by the courts. This trend which can be observed globally has placed courts at the centre of the resolution of presidential election disputes as well as other electoral disputes. This central judicial role in resolving electoral disputes notwithstanding, a general analysis suggests that the judicial systems across the globe have been reluctant in annulling presidential elections as declared by the electoral management bodies (EMBs). Yet very few studies have interrogated the policy implications that could arise from the judicial systems' exercise of judicial restraint in the resolution of presidential election disputes. This study sought to assess the policy implications arising from judicial resolution of presidential election disputes in Kenya. The study began by analysing the trends that have been emerging from the Kenyan judicial system when resolving presidential election disputes from between 1992 – 2013. The study relied on the Administrative Law theory of Red-light, Green-light and Amber-light. This theory helped demonstrate how the courts have been exercising their powers in resolving the administrative challenges of other organs of governance in Kenya. Whereas the Red-light theory seeks to control, limit or supervise the state and its power, the Green-light seeks to minimise the influence of the Courts over the other organs of governance. The blend of the two (Red-light and Green-light) which is the Amber-light provided a balance that suited the aims and objectives of the study. To analyse and describe the data, the study adopted a qualitative analysis approach. Particularly it used exploratory research design which pursued a critical review approach supplemented by targeted in-depth interviews with key informants who have been involved in the resolution of presidential election disputes in Kenya and use of questionnaires. The study targeted a sample size of 100 respondents drawn from judicial officers, legal practitioners, legal researchers, members of the civil society and politicians. Data collected was analysed and the results were then presented in tables and graphs. The study findings revealed that there is an emerging trend among Kenyan courts/judicial system to apply judicial restraint when resolving presidential election disputes. The major results of the study revealed that the policy implications for the exercise of judicial restraint in the resolution of presidential election disputes are that; first, doubt has emerged on the standards for the application and interpretation of what amounts to compliance with electoral laws. Second, there is lack of clarity on the applicable burden and standard of proof in presidential election disputes. Third, the EMBs and the courts have emerged to be wielding a lot of discretionary powers which are sometimes not backed by the prevailing electoral laws. The major recommendation from the study is that these issues need to be addressed through policy to avert possible policy challenges that may arise from future presidential election disputes and even all other electoral disputes in general.

## **LIST OF ABBREVIATIONS AND ACRONYMS**

AFRICOG – African Centre for Open Governance

AG – Attorney General

CJ – Chief Justice

ECK – Electoral Commission of Kenya

Eklr – Electronic Kenya Law Reports

EMBs – Electoral Management Bodies

EP – Election Petition

HCCC – High Court Civil Case

IEBC – Independent Electoral and Boundaries Commission

JA – Judge of Appeal

KLR – Kenya Law Reports

OI – Oral interview

## **OPERATIONAL DEFINITIONS OF TERMS**

Generally and universally, there is no term that is amenable to a single precise definition; however, for purposes of the study the following shall be the working definitions attached to these words:

**Judicial restraint** – This study adopts Kavanagh’s, (2009) definition of judicial restraint as the extent to which the courts are willing to change and develop the law, as well as the court’s sense of when and why it is appropriate to do so. As such “restrained” judges are careful about not letting their views of policy or morality to displace the law.

**The Non-justiciable political question** doctrine represents a judicial effort to ensure courts do not hamper the functioning of the political branches

**Judicial activism** refers to judicial rulings suspected of being based on personal or political considerations rather than on existing law.

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## **CHAPTER ONE:**

### **INTRODUCTION**

#### **1.1 Background of the study**

The Judiciary plays a critical role in the resolution of not only presidential election disputes but also all electoral disputes. The right to challenge electoral contests in courts springs from the competitive nature of elections which makes disputes inevitable (Reynolds, and Sisks, 1998). In such a case, the Judiciary is confronted with the challenge of either upholding or annulling presidential election results declared by the Electoral Management Body (EMB). However, in discharging that role, the Judiciary has in the past been reluctant to annul presidential election results as declared by the EMB. This trend of upholding presidential elections as declared by the EMBs' can be observed in many countries across the globe and is thus not unique to Kenya. If that trend continues unchecked, it may lead to several policy challenges which this study seeks to interrogate as the implications of judicial resolution of presidential election disputes.

Globally, in recent years there has been a substantial increase in the filing of presidential electoral disputes for purposes of resolution by the courts. This can be attributed to the increase in the confidence in the Judiciary by the general citizenry as the arbiter of not only electoral disputes but also of many other legal disputes (Oseko, 2013). Notwithstanding the growth in public confidence in the Judiciary, general analysis suggests that the judicial systems across the globe have been reluctant in annulling presidential elections as declared by the EMBs (Azu, 2015).

The parties to an electoral contest and whom may ultimately have an interest in the electoral dispute resolution mechanism are usually the candidates who present themselves to be voted

for in an election, the voter who exercises the right to vote, the EMB which presides over the election contest and the general citizenry who is affected by the decision of the EMB of declaring the winners and losers to that election. All those parties have an interest in an amicable resolution of electoral disputes. As such, the judicial system/ courts need to balance the interests of all of them. Such a balance may require either annulling or upholding elections as the case may be. Therefore, for the judicial system to often uphold the results of a presidential election as declared by the EMB then exposes that dispute resolution process to certain policy challenges. To that end, very few studies have been conducted to interrogate whether there exists any policy implications that arise from the resolution of presidential election disputes.

Globally, it is probably only in Ukraine and where a presidential election has ever been annulled where the Ukrainian Supreme Court ordered a repeat of the second round ballot (Aslund and McFaul, 2006). On the other hand, *Bush versus Gore*, 531 US (2000) is the most controversial presidential election dispute that has ever been determined by the USA Supreme Court. Suffice to say, the American Supreme Court upheld the results of that presidential election as declared by the EMB.

In Africa, there have been many decisions on the presidential election petitions that have been heard by the courts. Some of the recent and most famous in that regard have come from *Abubakar v Yar'Adua* filed in Nigeria (2008) 1 SC 77, *Nana Akufo Addo v John Dramani Mahama* filed in Ghana ((Writ No. J1/6/2013), *Movement for Democratic Change v The Chairperson of the Zimbabwe Electoral Commission* filed in Zimbabwe ((Case CCZ71/2013), *Besigye v Yoweri Museveni* filed in Uganda (2007 UGSC 24), *Anerson Kambela Mazoka and 2 others v Levy Patrick Mwanawasa and 2 others* filed in Zambia (SCZ/EP/01/02/03/2002), *Sierra Leone People's Party v National Electoral Commission and others* filed in Sierra Leone (S.C. CIV. APP. NO, 2/2011) . In all those countries, none of the

Courts where the presidential election dispute was referred annulled the presidential election results as declared by the EMBs.

Locally, Kenya has had a chequered history in the adjudication of presidential election petitions since the return of multi-party politics in 1991. Before 1991, no presidential election petition had ever been filed. Subsequent to all presidential elections after the return of multi – party politics, it is only in 2002 and 2007 that no presidential election dispute was ever filed in the courts for resolution. A cursory look at the presidential election petitions filed in the courts between 1992 and 2013 therefore suggest that none of the presidential election petitions filed throughout Kenya’s electoral history has ever been annulled as sought by the respective petitioners. The courts have, with various reasons, consistently upheld those results of presidential elections as declared by the EMBs. Those reasons as provided by the courts are the premise of this study and also are what are forming the underlying thread of this study as judicial restraint.

## **1.2 Statement of the problem**

All the presidential election cases that have ever been presented to courts include *Matiba v Moi* (1993), *Imanyara v Moi* (1993), *Orengo v Moi* (1993), *Mwau v Electoral Commission of Kenya* (1993), *Kibaki v Moi* (1997) and *Odinga v Independent Electoral and Boundaries Commission* (2013). However, *Matiba v Moi* (1993) and *Imanyara v Moi* (1993) never went to full trial though certain implicit perspectives may also be drawn from them for purposes of this study. The study therefore sought to examine how the Judiciary in Kenya has been resolving past presidential election disputes and whether or not there are any implications that have arisen as a result of the Judiciary’s approach in the resolution of presidential election disputes.

Thiankolu (2013) conducted a study which revealed that courts usually exercise judicial restraint when handling presidential election disputes. The rule on judicial restraint prohibits an undue readiness to invalidate elections on the part of the courts (Thiankolu, 2013). That rule on restraint can be traced to section 28 of the repealed National Assembly and Presidential Elections Act (Cap 7 Laws of Kenya) and the current section 83 of the Elections Act, 2011. Those respective provisions provide in the same manner that “no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.” The courts’ interpretation of these two provisions with regards to presidential election disputes is what can be seen to be suggesting judicial restraint.

Studies have suggested that while interpreting the same provision (section 28 and 83 respectively); that other than presidential election petitions, courts have always been willing and ready to annul every other election petitions such as those of members of parliament, senatorial, gubernatorial or even members of county assemblies provided it could be established that the conduct of such elections could not be said to have met the minimum threshold of free and fair elections or even complied with the Constitution and the electoral laws. However, when it comes to presidential election petitions, courts seem to exercise judicial restraint. That selective approach when it comes to presidential elections has the danger of resulting to policy challenges such as those in the study. Inevitably, a number of policy challenges have arisen as a result of the selective approach.

The study therefore seeks to look at the implications that may arise as a result of the approach the Judiciary has been adopting in resolving presidential election disputes in Kenya.

### **1.3 Objectives of the Study**

- i. To investigate the emerging trends arising from Kenya's judicial resolution of presidential election disputes.
- ii. To examine the factors that may have contributed to how judicial resolution of presidential election disputes has been happening in Kenya.
- iii. To investigate the policy implications that may have arisen out of judicial resolution of presidential election disputes.

### **1.4 Research questions**

- i. What are the emerging trends arising from Kenya's judicial resolution of presidential election disputes?
- ii. What are the factors that may have contributed to how judicial resolution of presidential election disputes has been happening in Kenya?
- iii. What are the policy implications that have arisen out of the judicial resolution of presidential election disputes?

### **1.5 Research Premises**

1. The emerging trends from Kenya's judicial resolution of presidential election disputes suggest that such resolutions have largely been informed by judicial restraint.
2. Focus on the need for political stability has contributed to the emerging trends in judicial ruling on Presidential election disputes in Kenya.
3. Past judicial resolutions on presidential elections have a great influence on policy on subsequent resolutions of presidential election disputes in Kenya.

## **1.6 Justifications and Significance of the Study**

Elections make a fundamental contribution to democratic governance. Globally, it has almost assumed the automatic method of choosing political leaders and making political decisions. The significance of conducting periodic elections cannot be gainsaid whether or not the said elections are held under authoritarian or democratic regimes. Therefore, this study will go a long way to achieve the following; first, this study hopes to be a micro-study of a macro-problem. Currently, the judiciary has faced a lot of criticisms in the wake of the delivery of Supreme Court of Kenya decision in the 2013 presidential election petition. It may therefore present a good critique to the effect of using judicial restraint in resolving presidential election disputes. Second, this study hopes to provide a platform for possible reforms of the electoral processes in future especially on the policy of restraint in annulling elections. Third, this study could influence future policy approaches to be adopted in the resolution of presidential election petitions. Fourth, the study is likely to give insights which could be drawn from that may help in achieving the political stability of the country. That is so because in the past the country has often experienced political instability after every electoral cycle.

## **1.7 Scope of the study**

The study largely discussed only those presidential election petitions that went to full trial before the Kenyan courts between 1992 and 2013 and how they were resolved. Those cases that went to full trial include; *Orengo v Moi* (1993), *Mwau v Electoral Commission of Kenya* (1993), *Kibaki v Moi* (1997) and *Odinga v Independent Electoral and Boundaries Commission* (2013). However, *Matiba v Moi* (1993) and *Imanyara v Moi* (1993) never went to full trial though certain implicit perspectives arising from them will be drawn and discussed for purposes of this study.

## **1.8 Limitations and Delimitation of the Study**

A major challenge that occurred was that there is not enough literature available on the resolution of presidential election disputes apart from the very court judgments in question that determine such matters. This challenge was mitigated by conducting interviews with relevant key informants/ stakeholders who have been involved in the resolution of presidential election disputes as well as reviewing studies from other African countries whose courts have had an opportunity to determine presidential election petitions.

## **CHAPTER TWO:**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

This chapter presents a literature review of the study. It however begins by providing a historical account of how courts have resolved presidential election disputes in the past. It then reviews the literature on factors contributing to judicial resolution of presidential election disputes and then the implications arising from judicial resolution of presidential election disputes in Kenya. It also presents the summary and research gaps that have arisen from the literature reviewed the theoretical framework and finally the conceptual framework.

#### **2.2 Empirical Review**

The literature that has been reviewed for purposes of this study is arranged based on the sub themes of the study which are the emerging trends from judicial resolution of presidential election disputes which has been captured under the historical analysis; the factors contributing to judicial resolution of presidential election disputes and the implications arising from the judicial resolution of presidential election disputes.

##### **2.2.1 Historical analysis of resolution of past presidential election disputes**

The historical account of resolution of past presidential election disputes presented here is largely to clarify and establish the emerging trends on how the judiciary has been resolving presidential election disputes.

The historical account that is provided in this section is largely drawn from decisions of the Superior Courts that have been rendered with regards to presidential election disputes. It provides the analysis in three parts, the global, regional and local perspective. Under each

perspective save for Kenya, the study has limited itself to the most recent presidential election dispute. This historical analysis provides a response to the first objective of investigating the emerging trends from Kenya's judicial resolution of presidential election disputes.

Globally, the study looked at the United States of America as a representative of the global north. It was the most recent but also controversial presidential election decision ever delivered by the United States of America Supreme Court was in the case of *Bush versus Gore*, 531 US (2000). In that case, the central issue before the courts revolved around the tallying of votes in Florida State. The dispute emerged as a result of Florida State's electronic voting machines. The ballot papers were not properly punched thus a large number of ballots did not reveal who the voter intended to vote for. The Democratic Party presidential candidate (Al Gore) petitioned that the ballots be manually recounted in a formal case, filed before the Circuit Court of Florida. Originally Al Gore won his case and the ballots were manually recounted; however, the Republican Party candidate (George W. Bush) approached the US Supreme court arguing that the manual recount undermined the 14th Amendment to the United States Constitution. George W. Bush contended that the recount violated the American presidential election system by violating the preservation of equality and uniformity that existed within the administrative system. The United States Supreme Court ruled in favour of George Bush. The Supreme Court explained that the state of Florida violated the 14th Amendment by enacting a recounting procedure. Specifically, the recounting procedure violated the Equal Protection Clause of the 14th Amendment. The Equal Protection Clause to the 14th Amendment of the United States Constitution requires the federal government to respect, maintain and uphold the legal rights of American citizens. Governments in the United States are not allowed to infringe on the civil rights and liberties

of its people. (Although Bush received 543,895 fewer individual votes than Al Gore nationwide, Bush still won the election, receiving 271 electoral votes to Gore's 266).

Regionally, within the African continent, there have been many decisions on the presidential election petitions that have been heard by the courts. Some of the recent and most famous in that regard include; *Abubakar v Yar'Adua* filed in Nigeria, *Nana Akufo Addo v John Dramani Mahama* (Ghana), *Movement for Democratic Change v The Chairperson of the Zimbabwe Electoral Commission (Zimbabwe)*, *Dr. Kiza Besigye v Yoweri Museveni (Uganda)*, *Anseron Kambela Mazoka and 2 others v Levy Parick Mwanawasa and 2 others (Zambia)*, *Sierra Leone People's Party v National Electoral Commission and others (Sierra Leone)*. In all those countries mentioned, none of the presidential election petitions has ever been successful. Essentially, the courts have consistently upheld the elections thereby dismissing those presidential election petitions.

Locally, Kenya's history has not been any different. Of the six presidential election petitions, none has ever been successful. Following the 1992 elections, four petitions were filed. Two of them were knocked out on technicalities. *Matiba v Moi* (2008) 1 KLR (EP) 670 was filed by the runner up in the 1992 election, and was dismissed because someone other than the petitioner signed the petition. *Imanyara v Moi* (2008) 1 KLR (EP) 472 also suffered a similar fate; it was dismissed due to late service by a day.

*Orengo v Moi* (2008) 1 KLR (EP) 597 went to full trial and was dismissed. The main limb of the case was that the incumbent was disqualified from running as he had been President for more than two terms previously. The judges dismissed this argument on the basis of non-retrospectivity of the amending law. The last of the four must petitions was *Mwau v Electoral Commission of Kenya and 2 others* (2008) 1 KLR (EP) 691, in which the applicant, who had been sixth in the election, argued that he was the only eligible candidate as only he had

presented his papers on “40 sheets of foolscap”, as required by the regulations, while all other candidates had used A4 papers. The petition was dismissed.

Only one petition emerged from the 1997 election. *Kibaki v Moi* (2008) 2 KLR (EP) 351 suffered the fate of its predecessors -- it was dismissed for lack of personal service, despite service having been effected through publication in the Kenya Gazette. The learned judges decided that despite the patent difficulties of serving an incumbent President personally in State House, one had to show that they had tried and failed to effect service personally as this was the preferred mode of service.

No presidential election petition was filed following the 2007 Presidential elections. Subsequent to the 2013 elections, three presidential election petitions were filed at the supreme court of Kenya. The first was filed by private citizens – Mr. Denis Itumbi, Mr. Moses Kuria and Ms. Florence Sergon. They contested the inclusion of rejected votes in the final tally, which they argued had a distorting effect on the percentage votes won by each candidate. The second petition was filed by an NGO, Africa Centre for Open Governance (Africog). The petitioners in this case were Ms. Gladwell Otieno and Ms. ZahidRajan. They sought to demonstrate that constitutional and legal safeguards on the election process were so breached that the accuracy and legitimacy of the electoral outcome was questionable. The third petition was filed by the runner up to the presidential election, Mr. RailaOdinga. His petition generally contended that the electoral process was so fundamentally flawed that it was impossible to ascertain whether the presidential results declared were lawful.

All above three cases were consolidated and heard at the same time as *Raila Odinga and others v IEBC and others*, Petition No. 5 of 2013 or (2013) eKLR. The *Raila Odinga* Petition was dismissed mainly on the ground that there was not enough evidence adduced before the court to warrant annulling the election of the president elect.

From the foregoing, it is observed that none of the presidential election petitions filed throughout Kenya's electoral history has ever been annulled as sought by the respective petitioners.

### **2.2.2 Factors affecting judicial resolution of presidential election disputes.**

To begin with judicial restraint, Kavanagh (2009) defines judicial restraint as the extent to which the courts are willing to change and develop the law, as well as the court's sense of when and why it is appropriate to do so. Other commentators on judicial restraint have also largely limited their discussions on the definition and their thoughts as to what amounts to or what does not amount to judicial restraint such as Posner (1983), Strauss (2011), Talmadge (1999), Okpaluba (2003), and Sim (2009). The few that have attempted to provide an analysis of the instances of where courts have been challenged to apply judicial restraint in the resolution of disputes, the same has been limited to the question as to whether courts should either uphold or strike down pieces of statutes as passed by the legislature such as Lenta (2004, 2006), Lewan (2015) and Posner (1983). Incidentally, it is only Thiankolu (2013), a Kenyan writer who has attempted to discuss on how judicial restraint may influence the resolution of election disputes generally. This study attempted to borrow from Thiankolu's (2013) views but will limit the arguments to the question as to why the courts are largely seen to be reluctant in annulling presidential election disputes yet they are always ready to annul every other election as urged by Thiankolu (2013).

Secondly, most of the literature reviewed on non-justiciable political question doctrine such as by Shapiro (1962), Buta (2005), Ngugi (2007a), Ngugi (2007b) and Endicott (2010) argue that generally courts should be reluctant to descend into the political arena and that they should limit themselves to only justiciable issues that can be properly and adequately redressed by appropriate judicial reliefs. None of the works reviewed discusses matters to

deal with elections and the resolution of electoral disputes that may arise thereof. This study thus proceeded from the point that elections are generally political matters and due to their competitive nature, disputes are usually inevitable thus the need to invoke the jurisdiction of the courts. As such, courts cannot be expected to shy away from resolving such disputes even if it could be argued that they are of a political nature. This study therefore assessed the extent to which the doctrine of non-justiciable political question doctrine has been used in furtherance of judicial restraint in the resolution of presidential election disputes.

Thirdly, majority of the literature on judicial activism have largely revolved around the definition of what is and what is not judicial activism. That debate by writers such as Diala (2007), Kmniec (2004) and Cohn and Kremnitzer (2005) does not however extend to the question as to whether the courts reluctance to annul presidential election disputes can be attributed to judicial activism. This study therefore sought to find out whether by the reluctant actions of the courts in annulling presidential elections could be attributed to judicial activism.

Fourthly, majority of the literature reviewed on judicial independence mainly by Oseko (2011), Diescho (2008), Sihanya (2013) and the legislative frame work such as UN Basic Principles on the Independence of the Judiciary 1985, Bangalore Draft Code of Judicial Conduct 2001 , Universal Declaration of Human Rights 1948 were on the basic principles of an independent judiciary which included independence of the judiciary, freedom of expression and association, qualifications, selection and training of judges, conditions of service and tenure, professional secrecy and immunity, discipline, suspension and removal of judges. It is against that backdrop that this study assessed whether there has been judicial independence at the respective times when presidential election disputes have been presented before them for resolution. As such the study benchmarked whether the basic principles of judicial independence were met and if not, whether the lack of judicial independence could

be said to be the reason for the judicial restraint in the resolution of presidential election disputes.

### **2.2.3 Implications arising out of judicial resolution of presidential election disputes**

Azu (2015) conducted a study on why presidential elections usually fail and she argued that sometimes presidential election disputes are resolved using extra legal considerations. Her views seem to have been supported by those of Wachira (2013) and Lumumba (2015) who also argue that sometimes the court looks into political considerations when resolving presidential election disputes. This study found out that such extra legal considerations are what have largely contributed to the reluctant approach in which the courts have resolved presidential election disputes.

Ojwang (2013) conducted a study on the emerging lessons from judicial determination of electoral disputes in which he urged that courts should always restrain themselves from annulling electoral disputes. He argued that at common law, it is presumed that all official acts are rightly and regularly done. It is also presumed that all official records are accurate. This study however found that such an approach is what has led to several policy questions remaining unanswered regarding resolution of presidential election disputes for instance the failure to subject the results as declared to serious scrutiny leads to an unclear standard as to what amounts to compliance with electoral laws.

Abuya (2009) evaluated the impact of substandard presidential election using Kenya as a case study. He argued that there was a link between free and fair elections and the enjoyment of human rights as well as analysed the causes and implications of disputed presidential polls. This study therefore heavily borrowed from his study and gave further consequences that have arisen as a result of the approach the judiciary takes in resolving presidential election disputes.

Abuya (2010) conducted a study asking the question as to whether it was possible for African States to conduct free and fair presidential elections. He attributed the failure to conduct free and fair elections to the inefficiencies of the Electoral Management Bodies and the failure to uphold the rule of law. This study found out that the increasing scope of discretionary powers of the EMBs has largely contributed to why most elections have been disputed and further that the Court's uncritical approach towards the excesses of the EMBs has also led to adverse consequences.

Wachira (2013) wrote a commentary on the 2013 presidential election dispute (*Raila Odinga and other v IEBC and others*) where he challenged how the Electoral Management Body's (EMB) managed the 2013 elections. Specifically, he argued that the Supreme Court of Kenya was largely tolerant and uncritical of the Electoral Management Body's explanations on their handling of the voters registers. Also that the court did not come out clearly on the EMB's duty to ensure that the final results of the Presidential election could be verified against the provisional results and further that the court took judicial notice of the technology failures in the conduct of the elections as opposed to being to bringing the EMB to account for its role in the management of that election. This study found that the court's decision in that case aided in increasing the scope of discretionary powers of the EMB which may lead to adverse consequences in the future.

Sagay (2010) conducted a study on the crisis of election petitions and decisions in which he argued that courts sometimes took a deliberate step to misinterpret the electoral laws to suit certain private ends such as suiting the party in power where they are the major actors in the election petition. He therefore urged where there was sufficient evidence to warrant annulling an election then courts should always do that. This study borrowed heavily on Sagay's (2010) views especially with regards to what amounts to compliance with electoral laws to warrant

either annulling or upholding a presidential election and the question of the standard of proof in electoral disputes.

Thiankolu (2013) argues that the Courts should always adopt judicial restraint when dealing with presidential election disputes. He argues that the restraint in respect of electoral law posits that courts should strive not to nullify elections and only do so under very rare circumstances. This is based on the Common law presumption of regularity in common law (*“omniapraesumuntur rite et solemniteressaactadonecprobetur in contrarium”*). Where it has been proved that an "official act" has been done, it will be presumed, until the contrary is proved, that the said act "complied with any necessary formalities" and that the person who did it was "duly appointed. Whereas Muthomi Thiankolu (2013) advocated for judicial restraint, this study queried why then does the courts (generally) and the Supreme Court particularly has in the past readily annulled elections with respect to National Assembly members, senators, governors and county representatives where electoral irregularities have been established yet when it comes to presidential elections it expresses reluctance.

Musila (2013) argued that by adopting judicial restraint, the courts have often approached the exercise of judicial function from a formalistic, technical and rule bound process especially in election petitions. Specifically, he discussed the approach taken by the Supreme Court in the resolution of *Raila Odinga v IEBC* (2013) petition, for which he said that the court regrettably reverted to a conservative, formalistic and non-consequentialist approach. As such he argues that the doctrine of judicial restraint has often led to the courts making decisions on matters of technicality as opposed to substantial issues. He questioned the basis for the electoral laws globally providing that elections can only be annulled where there is substantial non-compliance with the law. However, this study picked from where he left and found that in all the presidential petitions presented before the courts, neither the Supreme

Court of Kenya nor the other courts within the Kenyan judiciary have been able to unpack what amounts to the substantial compliance with the electoral law is or means.

### **2.3 Summary and Gaps to be filled by the Study**

The literature review of this study was conducted in line with the objectives of the study. First, with regards to examining the emerging trends from Kenya's resolution of presidential election disputes, the study showed looked at all the decisions that have been rendered by the courts on disputed presidential elections. After examining the historical account of the trends, it appeared that none of the presidential election petition that was presented to the Court was ever annulled. The study therefore picked up on that trend and sought to address the issue as to why that was the case as well as to address the possible implications that have arisen as a result of the Court's reluctant approach in annulling the said Presidential elections.

Secondly, with regards to the factors that affect how the judiciary has been resolving presidential election disputes, the literature reviewed established that the following factors have played a key role; judicial restraint, judicial activism, non-justiciable political question doctrine and notions of lack of judicial independence. Although most of the literature reviewed under this head did not present a clear picture on how those factors have played a key role in the resolution of presidential election disputes, inferences were drawn from them to suggest how those factors have played a role in the resolution of other disputes generally. The study therefore went further to examine how each of those factors played a role in the way the courts resolved presidential election disputes. The study used views from the respondents to corroborate that fact.

Thirdly, with regards to the implications arising as a result of judicial resolution of presidential election disputes, most of the literature reviewed suggested various reasons however none of those studies reviewed looked at the effect of the Court's approach to the

question of compliance with electoral laws, the issue of the standard and burden of proof and the issue of the increasing scope of the discretionary powers of the EMBs and the Courts.

## **2. 4 Theoretical Framework**

The Theoretical framework used in the study is the Red-light, Green-light and Amber-light theories of administrative law. Generally, this theory though comprising of three parts (Red, Green and Amber) is usually considered as one theory because one component explains the other (Barnett, 2011). It explains the different approaches to the scope of the state's power to administer. Particularly, with respect to this study, it focuses on the power of the judiciary in resolving presidential election disputes. However, the third component of the theory (the Amber-light theory) is hardly fully developed yet and remains doubtful in its usefulness (Klaaren, 1999). The choice of this theory facilitates the underlying thread in the study is how the courts exercise their administrative powers in resolving administrative challenges of the other organs of governance.

### **2. 4.1 The Red-light, Green-light and Amber-light theories**

The Red-light and Green-light theories were originally developed by Harlow and Rawlings (1984). To begin with the Red-light, they argued that the Red-light theory approach advocates for strong role for the courts to review administrative decisions. It considers that the function of administrative law is to control the excesses of state power. It embodied a deep-rooted suspicion of governmental power and a desire to minimize the encroachment of the state on the rights (especially property rights) of individuals. Essentially, the red-light theory has a negative view of state power and is one in which the emphasis is on the control, limitation and supervision of the state and its power, primarily through institutions of the law.

Harlow and Rawlings (1984) argue that the Green-light theory on the other hand considers that the function of administrative law is to facilitate the operation of the state. It is based on

the rationale that bureaucrats will function most efficiently in the absence of intervention. Administrative law should aim to help simplifying the procedures and enhance efficiency. It starts from the standpoint of a more positive, largely social and democratic view of the state. Essentially, the green-light theory has a more positive view of state power. Here, state power is an instrument for giving effect to social policies which will either benefit the general public or specifically defined communities. The main concern of many Green-light theorists was to minimise the influence of the courts. Courts with their legalistic values were seen as obstacles to progress and the control they exercise is undemocratic and unrepresentative (Barnett, 2011)

Due to the fact that Red-light and Green-light theories are essentially opposites, and the world is not entirely red and green, Boule and Harris (1989) developed the third part of the theory – the Amber-light theory (though it is not yet fully developed). The Amber-light theory suggests a blend of red and green light theories which depend on two principles. The first is that it is necessary to have judicial as well as political controls over administrative processes. The second is that such judicial review should be balanced against systematic needs of efficiency.

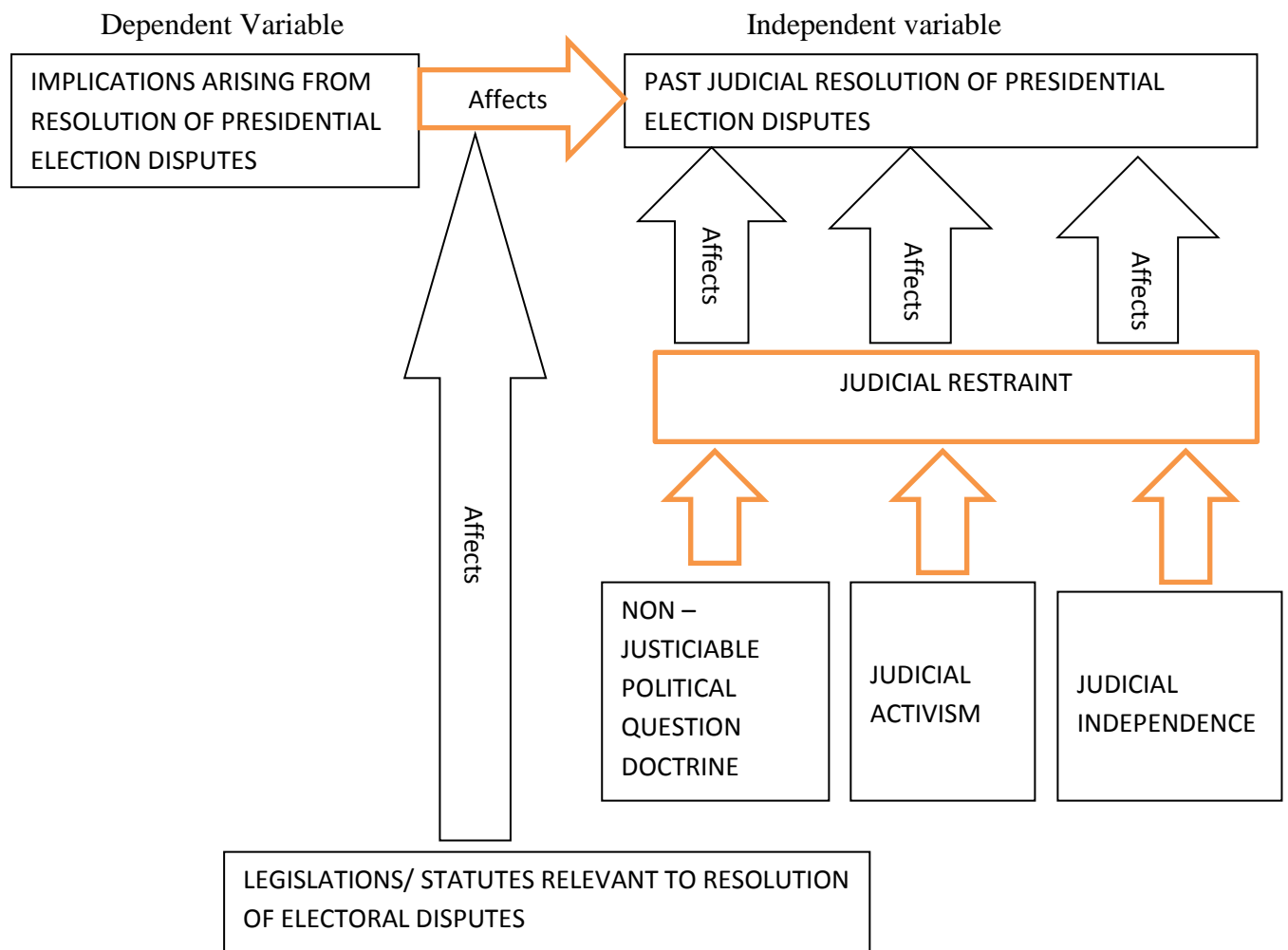
Preliminarily, this study proceeded from the premise that Kenya's judicial system can be seen to be reluctant towards annulling presidential elections hence the term, "judicial restraint". The Red-light, Green-light and Amber-light theories of administrative law therefore examined the correctness of that hypothesis. That will be achieved in this manner; first, this study presupposed that the judicial system should be vigilant while addressing presidential election disputes in the same manner they address other electoral disputes. That way, and in the terms of the Red-light theory, the courts will exert their strength in the review of administrative decisions. Thus the implications of judicial restraint that this study sought to interrogate may be a thing of the past. Secondly, by adopting judicial restraint, and in terms

of the Green-light theory the courts are seen to be minimising their influence by facilitating the operations of the state when it comes to presidential election disputes, while this may not be the case with other electoral disputes. Essentially, whereas the courts exert their strength in the Red-light theory, they minimise their influence in the Green-light theory.

## **2.5 Conceptual Framework**

The independent variable in this study is judicial resolution of presidential election disputes. The dependent variable is the implications arising as a result of resolution of presidential election disputes. Thus, implications arising as a result of presidential election disputes are dependent on the manner of judicial resolution of presidential election disputes. On the other hand, other parameters that influence judicial resolution of presidential elections include; judicial restraint, non-justiciable political question doctrine, judicial activism and judicial independence while the intervening variables are the legislations/ laws that concern the resolution of electoral matters.

### 2.5.1 Diagrammatic representation of the conceptual framework



#### Intervening variable

In this study, an attempt is made to find out the implications of judicial resolution of presidential election disputes. However, to do so, certain factors such as non-justiciable political question doctrine, judicial activism and judicial independence are underlying factors that influence the court’s exercise of judicial restraint as well as the prevailing legislations/ statutes on resolution of electoral disputes that form the intervening variable.

## **CHAPTER THREE: RESEARCH METHODOLOGY**

### **3.1 Introduction**

This chapter presents the research methodology of the study. Particularly, it highlights the research design, site of the study, target population, sampling and sampling procedures, data analysis and ethical considerations that will help in the conduct of this study.

### **3.2 Research Design**

This study pursued a qualitative analysis approach. Particularly it used exploratory research design. The exploratory design was deemed to be a better option in uncovering, understanding and yielding the policy challenges arising from the resolution of presidential election disputes. Then study thus analysed the decisions rendered by the Kenyan courts in an attempt to unpack the running thread of judicial restraint.

The choice of exploratory research design was apt because it facilitated proper diagnosis of the situation at hand; it also helped in screening the alternatives as well as suggesting possible recommendations through the generation of new ideas. The ultimate goal was to formulate the problem and clarify concepts which the study dubbed as the implications of judicial restraint.

### **3.3 Site of the study**

The site of the study was Nairobi City County. Nairobi is the capital city of the Republic of Kenya. It is also the seat of the Judiciary where the Supreme Court of Kenya is located. Article 163(3) of the Constitution of Kenya, 2010 provides that the Supreme Court is the court with the jurisdiction to hear and determine disputes arising from presidential election disputes. The Supreme Court is the highest court in the land and is presided over by a president who is also the Chief Justice of the Republic of Kenya. However, in the past,

presidential election petitions were determined at the High Court with the right of appeal to the Court of Appeal. Further, the choice of Nairobi city as the site of this study is because the National Council for Law Reporting (Kenya Law) is also located in Nairobi. Most of the decisions discussed in this study were drawn from the National Council for Law Reporting. The National Council for Law Reporting is the state agency mandated with the publishing of the official law reports for the Republic of Kenya.

### **3.4 Target Population**

The target population for purposes of the study were drawn from multiple stakeholders who have been involved in the resolution of presidential election disputes. They included judicial officers, legal practitioners, legal researchers, politicians and members of the civil society who were drawn from organizations that have been actively involved in the resolution of presidential election disputes such as the Independent Electoral and Boundaries Commission and the African Centre for Open Governance (AFRICOG). The study sampled 100 respondents.

### **3.5 Sampling technique and sample size**

#### **3.5.1 Sampling Techniques**

The study used non-probability sampling methods. Particularly, it used purposive sampling to identify the respondents. Purposive sampling was employed because it allowed the researcher to select only those stakeholders/ individuals who were presumed to be able to provide in-depth information on the subject of the study. Further, the sample characteristic for this study was specific to those more involved in the resolution of presidential election disputes.

### 3.5.2 Sampling Size

The study selected a sample size of 100 respondents that were drawn from judicial officers, legal practitioners, legal researchers, politicians and members of the civil society. The table below shows the distribution of the sample from each target population.

<b>Particulars</b>	<b>Frequency</b>
Judicial Officers	20
Legal practitioners	20
Legal Researchers	20
Members of the Civil society	20
Politicians	20
<b>Total</b>	<b>100</b>

### Key Informants

A sample of 6 respondents was selected from the five categories of the respondents. They included 1 judicial officer, 2 legal practitioners, 1 legal researcher, 1 member of the civil society and 1 politician. They were purposively sampled and interviewed to give in depth information on the resolution of presidential election disputes in Kenya. These respondents were selected because of their unique experiences and knowledge in electoral issues generally and presidential elections particularly. The data collected from them was then recorded through note taking. Each of the key informants was assigned a code to protect the confidentiality of the information they gave during the interview sessions.

### **3.6 Data Sources**

This study being a qualitative research was largely based on both primary and secondary data. Primary data was collected from respondents who have been involved in the resolution of presidential election disputes such as judicial officers, legal researchers, legal practitioners, politicians and members of the civil society that have been engaged in resolution of presidential election disputes.

Secondary data was collected from various literatures including books, journals, dissertations, thesis reports, government policy documents, decisions/ judgments from courts, national laws and reports that are relevant to the study. The method provided the basis for the study since it helped draw information from previous studies. This also helped in identifying gaps in the previous research conducted by other researchers.

### **3.7 Data Collection Instruments / Techniques**

The study used interview guides/ schedules and questionnaires as the main data collection instruments.

#### **Interview guides**

The nature of the interview conducted was a semi – structured interview. The choice of a semi structured interview was most suitable for this kind of study because of the qualitative nature of the study. That required that the oral interview was focused on certain questions but with the scope for the respondents to express themselves at length.

The conduct of interviews involved oral questioning of respondents. The choice of interviews was used mainly for the category of the key informants who were useful in providing key in depth information regarding the resolution of presidential election disputes. Answers to the questions posed during the interviews were recorded by writing them down (either during the

interview itself or immediately after the interview). The interviews were conducted with varying degrees of flexibility. Subsequently, each interview questionnaire was assigned a specific code to identify it. The primary data therefore supplemented the limited literature available by providing in depth information/opinions.

## **Questionnaires**

To supplement the information gathered from the interviews, questionnaires were also used in this study since it has the advantages of relative ease of administration and lower expense, high return rate and reliability. Further, the use of questionnaires was for purposes of obtaining general and further information regarding resolution of presidential election disputes from respondents whom could not be individually interviewed. Each questionnaire was semi- structured consisting of both open ended and closed ended questions. The questions therein were very simple but very comprehensive thus the respondents did not experience any difficulties in completing them.

### **3.8 Data Collection Procedures**

Before conducting the field research, the researcher sought permission from the University's Graduate School who facilitated the requisite introductions to the National Commission for Science, Technology and Innovation (NACOSTI). NACOSTI thereafter granted permission to undertake the research.

Thereafter, a sample size was chosen. The study then administered the research instruments to the respondents of the study. The study exercised care and control to ensure all questionnaires were issued to the respondents, and to achieve that, the study maintained a register of questionnaires which were then administered. The researcher also visited the key informants of the study and also conducted in depth interviews with them. Their views were equally recorded and coded for purposes of confidentiality.

This study being largely a congruence of policy and law whereby it sought to interrogate how the underlying policy of judicial restraint has led to serious implications in the resolution of presidential election disputes and the development of electoral governance in general. Law, being a reflection of social values of a society, makes scientific based methods of inquiry (quantitative methods) inappropriate (Jupp, 1989). Conduct of experiments or surveys with a scientific objective may not achieve the best results (Jupp, 1989). Qualitative research was therefore much better suited for this study, as it has been used to capture the definitions and constructions which underpin the decisions of the courts. This is done in ways which are neither feasible nor desirable via the use of 'hard' quantitative data (Taylor, Sinnha, Gloschal, 2007). Within the rubric of qualitative data collection method, this study used documentary research method (the use of documentary sources), case study method and historical analysis. All those were supplemented with conducting interviews with key stakeholders involved in the resolution of presidential election disputes.

### **3.9 Data analysis**

The data analysis pursued a qualitative approach. Kombo and Tromp (2006) argue that qualitative data, such as finding out the views of respondents on a certain issue is not always computable by arithmetic relations. The responses are usually categorised into various classes which are called categorical variables. For instance, the study sought to obtain the respondents' views on the implications that have arisen from the judicial resolution of presidential election disputes.

The analytic techniques that the study used involved the following; first, the study summarised the key findings. The researcher noted down the responses from the respondents on various issues. Second technique was explanation. The researcher attempted to give contextual understanding and meanings to the issues raised. Finally, the study provided

interpretations and conclusions. These rapid data analysis techniques were desirable because they were mainly used in situations that require urgent information to make decisions. The technique is also used when the results already generated are obvious, making further analysis of data unwarranted (Kombo and Tromp, 2006).

### **3.10 Ethical and Legal Consideration**

The study endeavoured to adhere to ethical research behaviour by; first, obtaining relevant consents that were necessary for the successful completion of the study. The consents were sought from all relevant authorities and respondents. Secondly, all material and literature cited in the work is duly acknowledged and duly attributed to their rightful owners. Thirdly, the study endeavoured to assure all the respondents of the confidentiality and privacy of the information they provided for the study. Fourth, the presentation of the findings and interpretations of the study reflected honesty and objectivity. Finally, the results of the study will only be used for academic research and any other incidental purpose arising from academic research.

## **CHAPTER FOUR:**

### **DATA ANALYSIS, PRESENTATION AND DISCUSSION**

#### **4.1. Introduction**

This chapter presents the analysis of data followed by a discussion of the research findings. The findings relate to the research questions that guided the study. In this chapter the results of the data analysis are presented. The data were analyzed to identify the emerging trends from Kenya's judicial resolution of presidential election disputes. To examine the factors that may have contributed to the judicial resolution of presidential election disputes. To find out the policy implications that has arisen out of judicial resolution of presidential election disputes.

The questionnaire comprised of three sections and data generated will be presented as follows:

The first section comprises of demographic data such as gender, age bracket, although it was not part of the purpose of the study, this set of data was intended to describe demographic variables of the sample and to assess for any influence on the research findings. This section will also comprise of positions of the respondents in sample population, and awareness of the presidential disputes.

The second section comprises of data describing trends that have emerged from the judicial resolution of presidential election disputes and factors that contributed to how the judiciary has been resolving presidential election disputes in Kenya.

In the third section data obtained from the analysis of possible implications that have arisen as a result of how the judiciary has been resolving presidential election disputes in Kenya and possible recommendations towards addressing the identified policy challenge in presidential election disputes.

## 4.2 Data Presentation

### 4.2.1 Response Rate and Position of the Respondent

Out of the expected sample of 100 respondents, only 95 were reached and interviewed and answered the questionnaires, thus giving a response rate of about 95%. The results of the study are presented in table 1.1 below.

**Table 1.1: Showing the Composition of the Respondents**

<b>Particulars</b>	<b>Frequency</b>	<b>Percentage</b>
Judicial Officers	20	20
Legal practitioners	20	20
Legal Researchers	20	20
Members of the Civil society	18	18
Politicians	17	17
<b>Total</b>	<b>95</b>	<b>100</b>

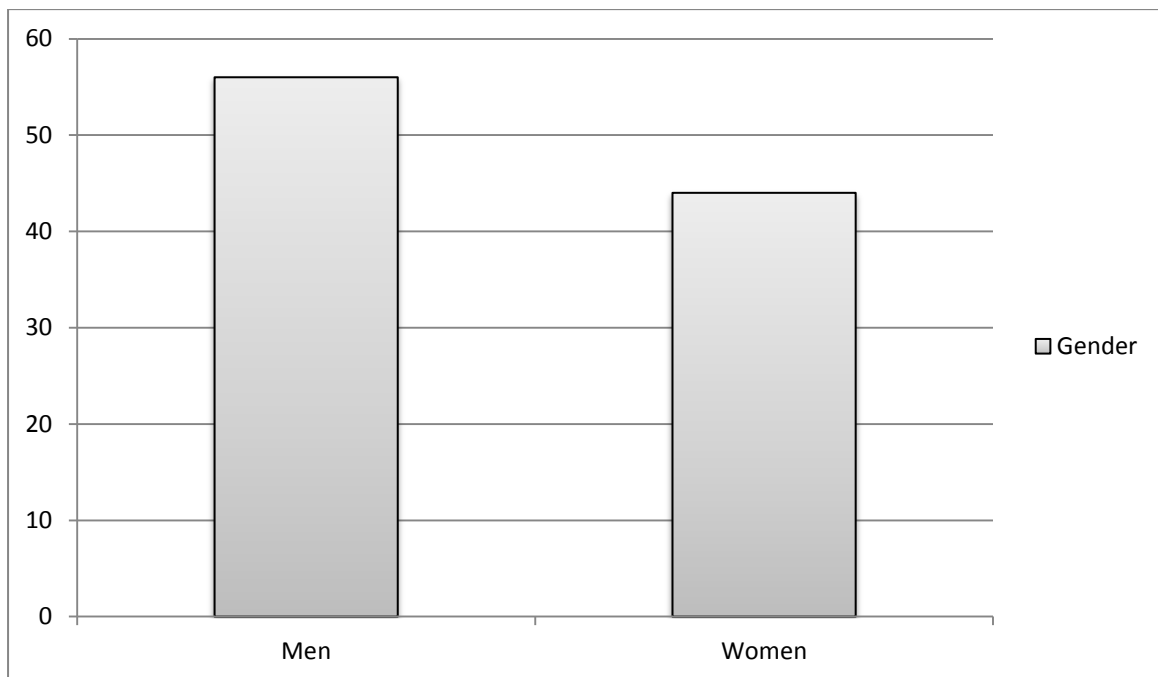
**Source: Research Data (2016)**

According to table 1.1, a total of 95 respondents interviewed gave a response rate of 100%. They constituted about 20% judicial officers, 20% legal practitioners, 20% legal researchers, 18% were from civil society organizations, and 17% were the politicians. This shows that all the respondents reached and interviewed knew about presidential elections disputes that have been resolved in Kenyan Courts and were concerned of the future implications and possibly what might help in policy recommendations and this implies a good sample for this study.

#### 4.2.2 Gender Distribution of the Respondents

The study examined the extent to which both genders are intertwined within research target population in order to avoid gender bias in the research findings. The research also intended to find out the level of awareness of both genders with regards to resolution of presidential elections disputes in Kenya. Figure 1 shows the findings

**Figure 1: Showing gender distribution**



**Source: Research Data (2016)**

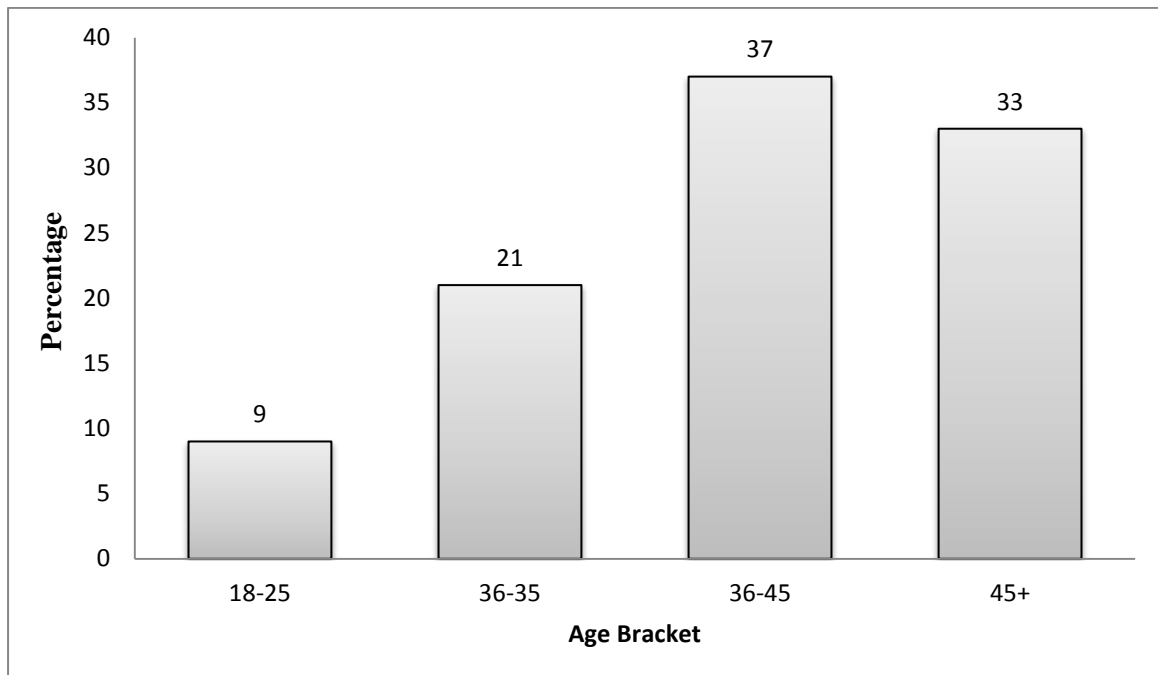
From figure 1, it's evident that about 56% of the respondents were found to be males and 44% were females. It implies that more men than women were interviewed and they were drawn from judicial officers, legal practitioners, legal researchers, civil society organizations, and politicians. Effectively, both genders were represented in the research study.

#### 4.2.3 Age Bracket of the Respondents

The research study also involved assessment of the age bracket of the judicial officers, legal practitioners, legal researchers, civil society organizations, and politicians within the sampled

population. Although age may not reveal the experience in the past presidential elections, this background information of the respondents was collected. Figure 3 shows the results of the research.

**Figure 2: Showing Age bracket**



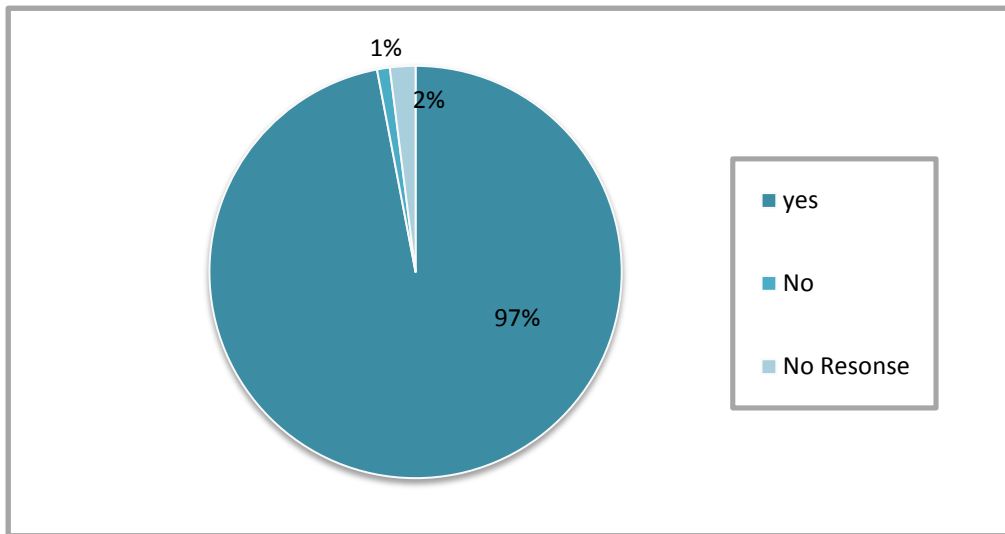
**Source: Research Data (2016)**

Figure 2, above reveals that 30% of the respondents represented both the age bracket of (18-26) and the age bracket of (26-35) years while a total of 70% represented the age bracket of (36-45) and the age bracket of 45+. The implication is that although the majority of the respondents were in the category of age bracket between 36 old years and 45+ years old, there were also youth categories of (18-25) to (26-35) years of age.

#### **4.2.4 Awareness of the presidential disputes**

The study also carried out an assessment of the respondents assessments on awareness of the resolution of presidential election disputes in Kenya. The findings are in figure 3 below.

**Figure 3: Showing the Awareness of the Presidential Disputes**



**Source: Research Data (2016)**

Figure 3, above indicates that 97% of the respondents were aware of the disputed presidential elections in Kenya, while 1% said they were not aware, and 2% did not respond. This implies that almost all the research respondents were aware of the disputed presidential elections. Therefore, their responses in research questions relating to trends and implications of the disputed presidential elections in Kenya could be informative to this piece of research. The 1% of the respondent who did not respond to this question and the 2% who did not respond could imply that they could be finding it sensitive to share their opinions on the subject of disputed presidential elections or were afraid to discuss the topic of disputed presidential elections. However, these are interpretations of the researcher and there is no way of substantiating such responses. So, because the 3% is negligible, the researcher considered them as outliers and therefore their responses will not be used in analysis and drawing conclusions and recommendations in this research paper.

#### 4.2.5 The presidential election disputes

The research also carried an assessment on the list of disputed elections in Kenya by asking the respondents to give a list of such elections that they could remember. The Table 1.2 below shows the findings.

**Table 1.2: Showing the list of disputed presidential elections in Kenya**

Particulars	Frequency
1992	93
1997	95
2007	95
2013	95
<b>Total</b>	<b>378</b>

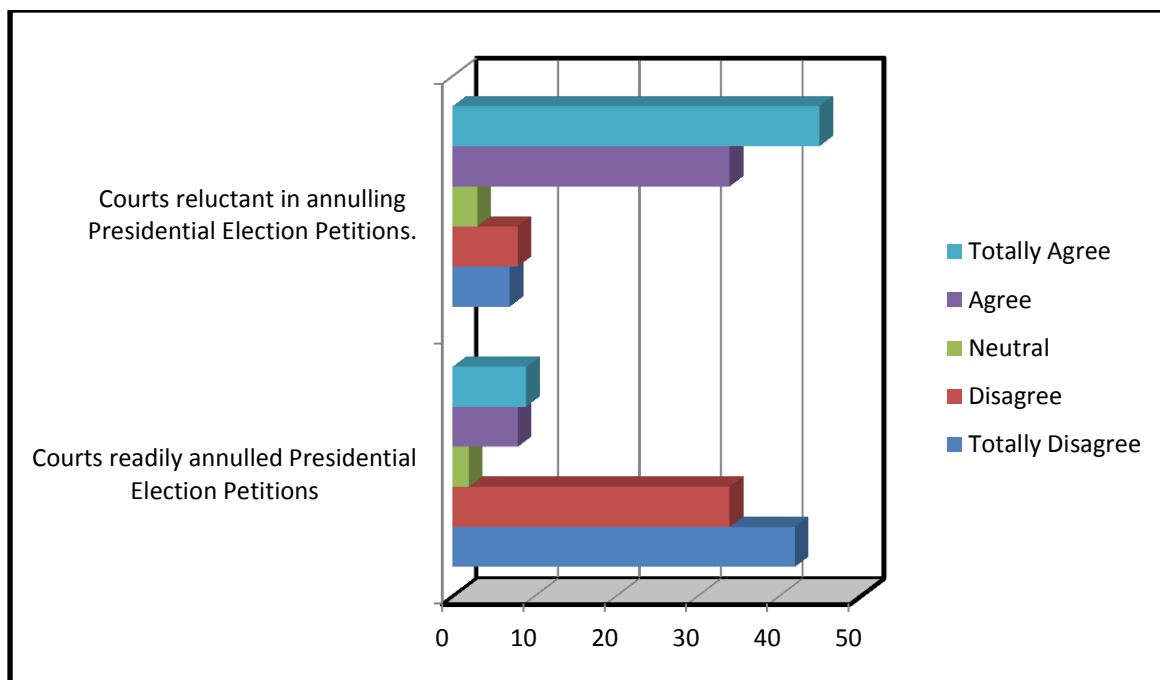
**Source: Research Data (2016).**

The table 1.2 above reveals that 93 respondents listed the 1992 disputed presidential elections, while all the 95 interviewed people listed 1997, 2007 and 2013 disputed presidential elections. This indicates that for the last two decades, there have been four disputed presidential elections, the literature review supports the results as follows; (*Mwau v ECK*, Election Petition No. 22 of 1993, *Orengo v Moi* and 12 others, Election Petition No. 8 of 1993, *Raila Odinga v IEBC and 3 others*, Petition No. 5 of 2013).

#### 4.2.5 Trends emerging from the judicial resolution of presidential election disputes in Kenya.

The study examined the emerging trends from the judicial resolution of disputes arising from the presidential elections. The respondents were asked the extent to which they agreed that the courts readily annul presidential elections petitions and Linkert scale of 1 to 5 was used for every response in order to determine reliability. The data was combined into two nominal categories of those who agreed and those who disagreed and Chi-square test was run. The findings are shown in the figure 4 below.

**Figure 4: Showing the Trends in Judicial Resolution Disputes in Presidential Election**



**Source: Research Data (2016)**

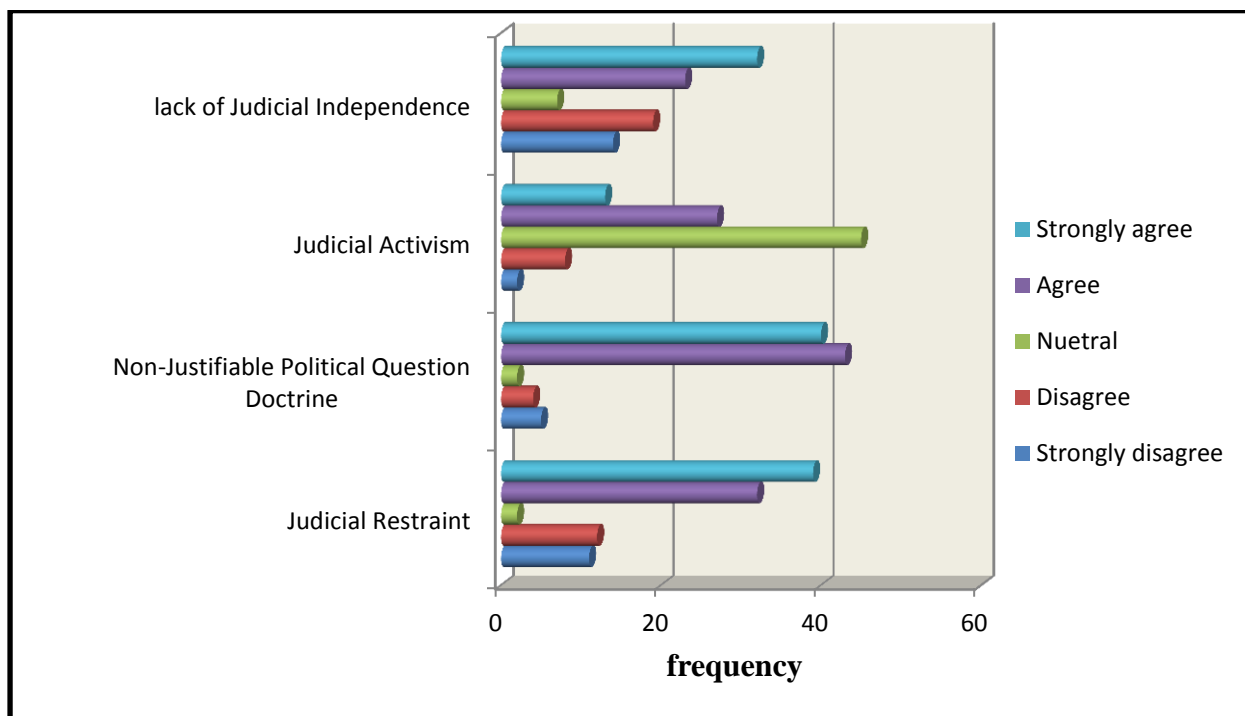
Figure 4 above shows that 45% of the respondents totally agreed that the courts are usually being reluctant in annulling the presidential election petitions, 34% agreed, 3% were neutral, 8% disagreed, and 7% totally disagreed. This implies that majority of the respondents tend to agree that the courts are always reluctant to annul the presidential election petitions in Kenya. A total of 79% totally agreed, 8% agreed, 2% responded neutral, 35% disagreed and 44%

totally disagreed. This implies that majority of the respondents point out that courts are always reluctant to annul the presidential elections petitions in Kenya.

#### 4.2.6 Factors contributing to how judiciary resolves disputed presidential election in Kenya.

The study also involved finding out the factors that influence how the judiciary resolves presidential election petitions. A Linkert scale of 1 to 5 was used on the four items and the findings are shown on the figure 5. The findings are in the table 1.3. The respondents were also asked to give other factors other than the ones mentioned in the scale that contributes to how the Judiciary has been resolving presidential election disputes in Kenya.

**Figure 5: Factors showing how Judiciary resolves presidential elections disputes**



**Source: Research Data (2016)**

The figure 5 shows that 33% of the respondents strongly agreed on lack of judicial independence in resolving the presidential elections disputes, 24% Agreed, 7% responded neutral, 20% disagreed and 14% strongly disagreed. This implies that more than 50% of the

respondents agreed on lack of judicial independence in resolving the presidential election disputes. However, 34% also disagreed to the judiciary lacking independence in resolving conflicts.

A total of 41% respondents agreed with judicial activism, 47% responded neutral and 10% tend to disagree with judicial activism, this implies that although many respondents could not agree or disagree with judicial activism, those who agreed were more than those who disagreed by 31%. There is also an implication that there is judicial activism but, its influence on how judiciary resolves the presidential election disputes is still minimal.

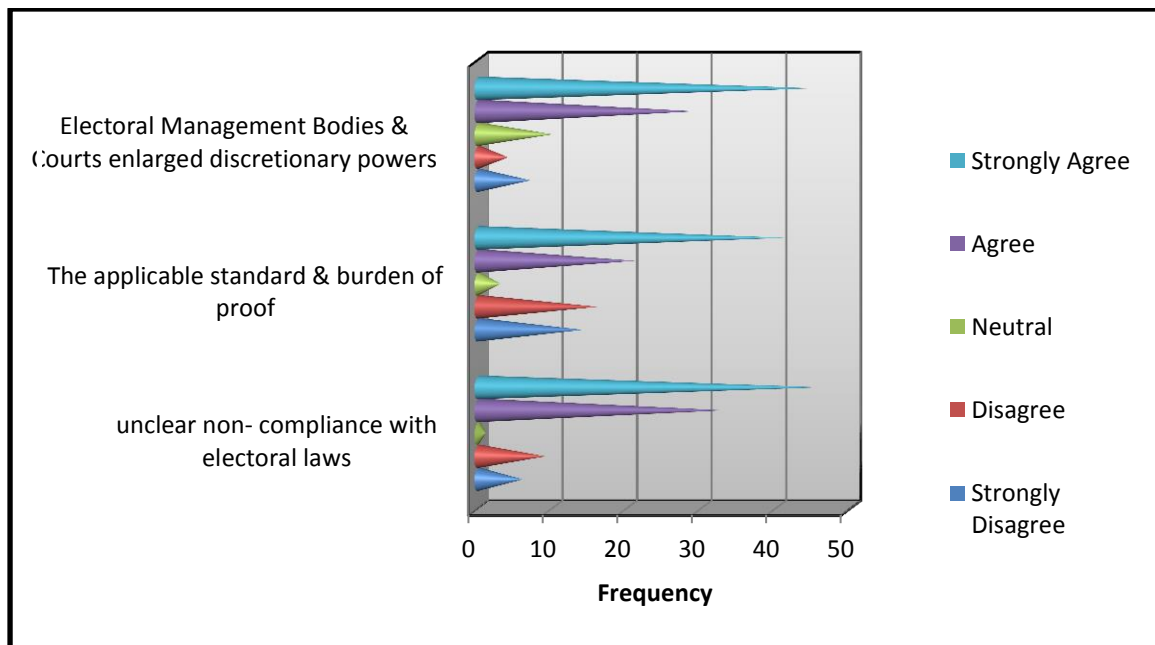
On the non-justifiable political question doctrine, 43% strongly agreed, 45% agreed, 2% were neutral, 4% disagreed and 6% strongly disagreed. On aggregate 88% agreed and 10% disagreed. This implies that non-justifiable political question doctrine affects judiciary's way of resolution of presidential elections.

41% strongly agreed that judicial restraint, 33% agreed, 2 responded neutral, 13% disagreed, and 11% strongly disagreed. This implies that judicial restraint largely affects the judiciary's way of resolving presidential election petitions.

#### **4.2.7 The implications arising from judicial resolution of presidential election disputes in Kenya**

The other objective of this study was to find out the implications arising from judicial resolution of presidential election disputes in Kenya. Respondents were given three hypotheses on Linkert scale and asked the extent they agree to them (strongly agree, Agree neutral, Disagree, and Strongly Disagree). The findings are shown in figure 6 below.

**Figure 6 Showing implications of the judiciary ways of resolving disputes of presidential election in Kenya**



**Source: Research Data (2016)**

**Non-compliance with electoral laws**

From figure 6 above on what amounts to non-compliance with electoral laws that may lead to nullification of a presidential election petition, 7% strongly disagreed, 10% disagreed, 3% were neutral, 34% agreed and 48% strongly agreed. On aggregate, 82% of the respondents agreed that it has become increasingly unclear as to what amounts to non-compliance with electoral laws giving that may lead to nullification of a presidential election.

These findings also support those of Sagay (2010) who argued that the issue of non-compliance with electoral laws has always attracted different applications and interpretation by the Courts leading to the detriment of the Petitioners. For instance sometimes courts could insist that a petitioner need not only show that there was non-compliance but also that such

non-compliance was also substantial and that as a result of non-compliance, there has been adverse effect on the results of the election.

Respondent (code 003) stated that, “the judicial system seems to have introduced the issue of ‘substantial’ compliance with the electoral laws for an election to be annulled; however the operating provision of the law which is section 83 of the Elections Act does not say so”. He stated that in Kenya, issues of non – compliance with electoral laws have been canvassed in all the four presidential election petitions that have gone for full trial. However, the courts in all those cases failed to decisively interpret what non – compliance with the electoral laws meant. It is only in *Raila Odinga v IEBC and 3 others* where the Supreme Court held that, for there to be allegations of substantial non – compliance with the electoral laws, any impropriety or irregularities cited by the petitioner must be shown to have actually affected the result of the election.

In *Orengo v Moi and 12 others*, Election Petition No. 8 of 1993, the petitioner’s main ground of claim was that the election of the 1<sup>st</sup> respondent as the President of the Republic of Kenya had been prohibited by section 9(2) of the Repealed Constitution. He thus raised the issue that the then incumbent had been disqualified from contesting the 1992 elections as he had been president for more than two terms (1979-1983; 1983-1988 and 1988-1993). Section 9(2), of the repealed constitution provides that a person could not be elected to the office of President for more than two terms with each term lasting for five years. The court held that, whereas, the issues raised by the petitioner could be said to fall under “substantial compliance with electoral laws”, the court dismissed the petitioner’s argument on the basis of non – retrospectively of the amending law. Therefore, section 9(2) of the Constitution, which had been introduced, vide the amendment Act No. 6 of 1992 was not meant to operate retrospectively.

In *Mwau v ECK*, Election Petition No. 22 of 1993, the petitioner raised the issue that he was the only eligible candidate to contest the 1992 elections as only he had presented his papers on “40 sheets of foolscap” as had been required by the regulations, while all other candidates had used A4 papers. He challenged the validity of the election of the successful candidate in the presidential elections as well as nomination of the candidature of all other presidential candidates for lack of compliance with the law that required the use of the “40 sheets of foolscap” while presenting their nomination papers. The Court dismissed the petition by holding that the “standard sheets of foolscap” referred to under Regulation 12 of the then Presidential and Parliamentary Elections Regulations meant the size of paper which was usually used by a majority of the people concerned i.e. the Kenyan general public. Thus, the provision of Regulation 12 was not a mandatory requirement. The only mandatory requirement as regards the nomination of a presidential candidate was to be found in section 5(3)(b) of the Repealed Constitution. That provision provided that the nomination of a presidential candidate had to be supported by a thousand voters. Therefore, the use of A4 papers as opposed to the “standard sheets of foolscap” did not render the instrument for expressing the manner of support by 1000 supporters void and the nomination based thereon was thus valid.

In *Kibaki v Moi* [2008] 2 KLR (EP) 351, the petitioner filed the election petition challenging the election of the 1<sup>st</sup> respondent as President of the Republic of Kenya in the general elections held in 1997. The respondent filed an application to strike out the petition on the ground that the petition had not been served on him. However, the court dismissed the petition for lack of personal service, despite having been effected through publication in the Kenya Gazette. The judges decided that despite the patent difficulties of serving an incumbent president personally in State House, one had to show that they had tried and failed to effect service personally as that was the preferred mode of service. The court held that the

only mode of service recognised under Rule 14(1) of the then National Assembly Elections (Election Petition) Rules, 1993 was personal service. As such no service had been effected.

In *Raila Odinga v IEBC and 3 others*, Petition No. 5 of 2013, the main legal issue that was raised by the petitioners revolved around whether the Constitutional and legal safeguards on the election process were so breached that the accuracy and legitimacy of the electoral outcome could not be established. Specifically, the other issues concerned the requirement under article 138 (4) of the Constitution of Kenya, 2010 that required the successful presidential candidate to garner more than half of the votes cast and at least 25% of the votes cast in each of more than half of the counties. They also challenged the EMB's discretion to use the "multiple registers" (the principal register, the Biometric Voter register, the Green Book and the Special Register) to the detriment of the petitioner. They also challenged the technological failure and breakdown of the Biometric Voter Registration (BVR) kit that led to the manual vote tallying hence cast doubt on the provisional results. They also raised an issue of the massive electoral fraud and malpractice, which they alleged, had worked towards the advantage of other competitors in the presidential race.

In general, they contended that the electoral process was so fundamentally flawed that it was impossible to ascertain whether the presidential results as declared were lawful. The Supreme Court however failed to resolve these issues substantively and instead chose to dwell on the issue of whether the irregularities complained of were so "profound" as to affect the result of the election. To which they held that non – compliance with the electoral laws could only occur if any impropriety or irregularities cited by the petitioner were shown to have substantially and actually affected the result of the election.

Respondent (code 004) observed that the reason for the confusion as to what amounts to compliance with electoral laws can be attributed to the court's erroneous reliance on Nigerian Electoral jurisprudence. Section 146 of the Nigerian Electoral Act, 2006 provides that; "an

election shall not be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election”. Suffice to say, unlike Nigeria’s section 146, Kenya’s section 83 (and formally section 28 of the National Assembly and Presidential Election Act) does not provide for “substantial non-compliance” and “substantial effect”.

### **Applicable standard of proof**

From figure 6 above on what is the applicable standard and burden of proof, 43% strongly agreed, 22% agreed, 5% responded neutral, 16% disagreed and 14% strongly disagreed. This means that more than 65% agreed that the applicable standard and burden of proof in Presidential Election disputes remains unclear even though 30% disagreed.

These findings are supported by the views of Ongoya (2013) who averred that the difficulty in establishing a universal standard of proof in election disputes is because election disputes are usually disputes *sui generis*. They are neither civil nor criminal.

Respondent (code 005) gave the example of the Ghanaian approach to the question of the standard of proof. He stated that the Supreme Court of Ghana in *Nana Addo Dankwa Akufo-Addo and 2 others v John Dramani Mahama and 2 Others* Writ No. J1/6/2013 has held that presidential election disputes are civil in nature and therefore the standard of proof is on a balance of probabilities unless where a crime is alleged in the presidential petition that the criminal elements are required to be proven beyond reasonable doubt. On the other hand, the Supreme Court of Kenya in *Raila Odinga v IEBC and 3 Others* Petition No. 5 of 2013 has held that the standard of proof is on a level higher than the balance of probability although failing below the level of reasonable doubt. However, where a criminal offence is imputed, in

connection with a normal proof in an election case, then proof of the alleged offence is to be upon a threshold of beyond reasonable doubt.

Respondent (code 006) had the same views as those of Respondent (code 005) and added that, whereas, the standards applied in Kenya and Ghana look similar on face value, they are actually very different in fact. The Ghanaian approach proceeds from the point that presidential elections are civil disputes unless when a crime is imputed; such an election is turns to be criminal. On the other hand, the Kenyan approach is high breed. It is neither out rightly civil nor criminal. At the end of the trial, the court decides on a standard that is above balance of probabilities and not beyond reasonable doubt. The big unanswered question would then be, at what point does a trial court establish that the matter is above balance of probabilities and not beyond reasonable doubt. This doubt has inevitably arisen as a result of the reluctance of the courts to annul presidential election.

Respondent (code 006) stated that sometimes courts have used both standards of beyond reasonable doubt and the standard of on balance of probabilities in the same matter which has led to confusion as to what standards need to be applied in electoral disputes. For instance, the Supreme Court in *Raila Odinga v IEBC and 3 others case* does that when dealing with data specific electoral requirements (such as those specified under article 138 (4) of the Constitution of Kenya, 2010 for an outright win in the Presidential election) the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.

The views by Respondent (code 005) seem to agree with those of Wachira (2013) and Lumumba (2015) that the requirement for proof beyond reasonable doubt for data specific electoral requirements such as those under article 138 (4) cannot not be reconciled with any known constitutional principle because in any event all election results were about data and thus there were no gradations of winning. He also stated that Supreme Court invented that “dramatic” new standard for presidential elections by stating that a petitioner challenging a

president – elect who had won in a first round election, as President Uhuru Kenyatta did, had to prove beyond reasonable doubt. It is impossible to reconcile that standard with the provisions of the Constitution of Kenya, 2010. That standard can only shield an elected leader from being subject to an election petition and that in future it will be difficult to ever have a run – off election so long as presidential candidates can by hook and crook get himself declared as president as that onerous standard of proof was incredibly difficult to discharge (Wachira, 2013) and Lumumba (2015).

### **Discretionary powers of Electoral Management Bodies and the Courts**

From figure 6 above, 47% of the respondents strongly agreed that electoral management bodies and courts have enlarged their discretionary powers, 30% agreed, 10% were neutral, 3% disagreed, and 7% totally disagreed. This implies that majority of the responses agreed that electoral bodies and courts have enlarged their discretionary powers, this means that there are implications on how the courts resolve the disputed presidential elections.

These findings support those of Ojwang (2013) who argued that EMBs (Electoral Management Bodies) have the exclusive mandate to ensure process legitimacy of the electoral process. That where there is no real impact of any alleged irregularity attributed solely to the EMB, then courts should not invalidate an election if such an irregularity had no or minimal effect. Ojwang (2013) therefore seems to excuse minor infractions by the EMB.

A respondent (code 001) reported that, “the manner in which the Courts have always excused the infractions done by the EMB is what has generally led to their expanded scope of discretionary powers”. Those views by the respondent (code 001) are also shared by the findings of Lumumba (2015) who argues that the Supreme Court of Kenya in *Raila Odinga v IEBC and Others* was largely uncritical and tolerant of nearly all the explanations as provided by the EMB.

A respondent (code 002) reported that, “As early as 1993, the cases of *Moi v Matiba* Civil Appeal No. 176 of 1993 and *Mwau v ECK* (2008) 1 KLR (EP) 691 depict how judicial restraint aided the increase in scope of the discretionary powers. In *Moi v Matiba*, Civil Appeal No. 176 of 1993 the first respondent’s wife had signed the election petition in exercise of a power of attorney granted by him. Rule 4(3) of the Repealed National Assembly Elections (Election Petition) Rules, 1993 provided among many other things that the election petition had to be signed by all the petitioners. The appellant thus argued that the election petition was incompetent because it had not been signed by the petitioner as was required by rule 4 (3) of the Repealed National Assembly Elections (Election Petition) Rules, 1993. The issue of law before the court was thus whether the words used in rule 4(3) in relation to who was to sign the election petition were of a mandatory nature or whether they were merely directory so as to allow a *donee* of a power of attorney to sign a petition on behalf of the election petitioner. The court of Appeal held that, the words such as “signed by the party” or “signed by him” in the statutory provision had to be given their natural meaning and that was that the party had to personally affix his signature. Those words were thus mandatory.

Similarly, in *Mwau v ECK and 2 others*, (2008) 1 KLR (EP) 691, where the courts held that the requirement for nomination presidential candidates to present their nomination papers in 40 standard sheets of foolscap was not a mandatory requirement. As well as in *Orengo v Moi* (2008) 1 KLR EP 597 where the courts held that the requirement barring presidential candidates who had served for more than two terms could not be applied retrospectively. Another instance where such has been exhibited is also in *Kibaki v Moi* (2008) 2 KLR (EP) 351 where the court held that the only mode of service recognised under Rule 14(1) of the then National Assembly Elections (Election Petition) Rules, 1993 was personal service notwithstanding the fact that the petitioner had used substituted service which was also a mode of service known to law”.

#### **4.2.8 Conclusion**

In this chapter, study results and a discussion of the findings have been presented. Findings from this study have been found to be consistent with the secondary data of literature review and several related studies cited in this paper.

The findings of the study found out that in terms of the Green-light theory of law, the Courts are seen to be minimizing their influence by facilitating the operations of the state when it comes to presidential election disputes, while this may not be the case when it comes to other electoral disputes. The Green – light theory of law generally considers that the function of administrative law is to facilitate the operation of the state based on the rationale that bureaucrats will function most efficiently in the absence of intervention. Thus, the findings of the study confirmed that theory that courts always exercise judicial restraint when it comes to resolving presidential election disputes.

## **CHAPTER FIVE:**

### **SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter provides the summary of the findings, conclusion and recommendations. The objectives of this study were to; investigate the emerging trends from Kenya's judicial resolution of presidential election disputes. To examine the factors that may have contributed to the judicial resolution of presidential election disputes. To investigate the policy implications that has arisen out of judicial resolution of presidential election disputes.

#### **5.2 Summary of findings**

The first objective of the study was met as follows; the study showed that the emerging trends suggest that Kenya's judicial system has been exercising judicial restraint in the resolution of presidential election disputes. All the presidential election disputes cases discussed in the study showed that no presidential election dispute has ever been annulled/ invalidated in Kenya. The courts generally exercised restraint thereby upholding the results of the presidential elections as declared by the EMB. The study found out that of the respondents sampled, 97% of them were aware of the disputed presidential elections in Kenya, while 1% said they were not aware, and 2% did not respond. Of the 97% of the respondents, they were also aware that the Courts have never annulled any presidential election dispute presented before it.

The second objective of examining the factors that may have contributed to the judicial resolution of presidential elections was realized by identifying them as judicial restraint, judicial activism, non-justiciable political question doctrine, judicial independence and the prevailing laws governing the electoral process. The study found out that a large number of

respondents agreed that those factors contributed heavily in the resolution of presidential election disputes. For instance, about 57% of the respondents agreed that there was a notion of lack of judicial independence when resolving presidential election disputes. About 41% of the respondents indicated that judicial activism played a key role. However, it is noteworthy that about 47% of the respondents were neutral with regards to their view on judicial activism. It was therefore instructive that the 41% represent the majority in the circumstances.

About 88% of the respondents agreed that the judiciary employed the doctrine of non-justiciable political question doctrine while about 74% of the respondents agreed that judicial restraint also plays a key role in the resolution of presidential election disputes.

The third objective of investigating the policy implications that have arisen out of judicial resolution of presidential election disputes was realized by discussing the three policy challenges of the lack of clarity in what amounts to non-compliance with the electoral laws, the doubt that exists in the applicable standards of proof and the challenge of addressing the ever increasing scope of the discretionary powers of the EMBs and the courts while resolving presidential election disputes.

First, it discussed how as a result of the exercise of judicial restraint, it has become unclear as to what amounts to substantial non – compliance with electoral laws that may lead to nullification of a presidential election. 82% of the respondents sampled confirmed that fact. The study established that in some cases where the electoral laws are clear and straight forward, the court went out of its way to provide an interpretation of such a provision that deviates from the conventional, plain and natural meaning of that provision. All the presidential petition cases discussed in the study raised an issue of compliance with electoral laws as the basis upon which the respective petitioners sought the elections to be invalidated or annulled. However, the courts rejected all those arguments for one reason or the other.

Second, 65% of the respondents sampled agreed that it had become increasingly unclear what was the applicable burden and standard of proof in presidential elections. The study discussed how the courts have been treating the question of burden and standard of proof in presidential election disputes. It observed that the courts have established the standard to be that “above balance of probabilities and not beyond reasonable doubts”. Such a standard cannot however be definitely determined because it is hard to measure at what point one is treading on a standard of above balance of probabilities and at what point one is almost treading on a standard of beyond reasonable doubt but falls short of it. That notwithstanding, the court in *Raila Odinga v IEBC and Others* went ahead to establish a new standard of proof that when it comes to statistical/ data specific electoral requirements, (cases challenging the validity or authenticity of electoral data/ results as presented by the EMB) then the standard of proof for such cases is on a standard beyond reasonable doubt. It therefore becomes hard to reconcile all those standards of proof in electoral disputes. The applicable standard of proof in presidential election disputes thus remains unclear.

Third, the study discussed the ever increasing scope of discretionary powers of the Electoral Management Bodies and the courts in presidential election matters. 77% of the respondents sampled in the study agreed that the scope of discretionary powers of the EMBs and the Courts had increased tremendously. It observed that as a result of the exercise of judicial restraint, the EMB has emerged to be wielding a lot of discretionary power which if not defined, checked and addressed may lead to an affront of the rule of law. Examples to that effect were drawn from the *Raila Odinga v IEBC and others* case where the court was largely tolerant and uncritical of all the explanations given by the EMB on their infractions of the law. Therefore, the major issue arising therefrom that needs to be addressed is that it has increasingly become unclear as to what extent can EMBs deviate from the prescriptions of the law.

Other than the three policy issues that have been discussed here, it has been observed that the precedential value of presidential election disputes is of high importance because more often than not the presidential election disputes are resolved by the apex courts of every legal system. For instance in Kenya, the decisions from presidential election petitions have had an influence in the determination of all other electoral disputes for gubernatorial, senatorial, national assembly and even County Assembly members.

### **5.3 Conclusion**

The study revealed that resolution of presidential election disputes has a huge impact on the development of electoral governance in general. Policy statements made in the course of resolving presidential election disputes affect the resolution of all other electoral disputes. For instance, the failure of the judicial system to substantially determine what amounts to substantial non – compliance with the electoral laws, the failure to establish the applicable standard of proof in electoral disputes and the failure to define the scope of the discretionary powers of EMBs and the courts leads to several policy challenges. This necessitates the need to address those policy challenges. However those policy challenges can be attributed to have emerged as a result of the exercise of judicial restraint. Further, the precedential value of presidential election judgments contributes immensely in the resolution of all other electoral disputes.

The study has met its justifications by providing analysis on the implications of judicial resolution of presidential election disputes. It argued that the judicial system has been exercising judicial restraint. The justification of the study has been that this study will go a long way to achieve the following; first, this study hopes to be a micro-study of a macro-problem. Currently, the judiciary has undergone a lot of criticisms in the wake of the delivery of Supreme Court of Kenya decision in the 2013 presidential election petition. It may

therefore present a good critique to the effect of using judicial restraint in resolving presidential election disputes. Second, this study hopes to provide a platform for possible reforms of the electoral processes in future especially on the policy of restraint in annulling elections. Third, this study could influence future policy approaches to be adopted in the resolution of presidential election petitions.

## **5.4 Recommendations**

### **5.4.1 Non – compliance with electoral laws**

At the core of the issue of (non) compliance with electoral laws, lies the issue of free and fair elections. There is need to introduce enforceable and clear standards for free and fair elections. Such standards will be able to identify the parameters under which an election can be declared to be free and fair. Article 81(e) of the Constitution of Kenya, 2010 already provides that free and fair elections are elections which are conducted by a secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; are transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. There is therefore need to ensure that these principles are made enforceable. The effect will be that where an election cannot be said to have met those principles then such an election ought to be invalidated or annulled. The proper meaning of “free and fair elections” should therefore be drawn from article 81 (e) of the Constitution of Kenya.

International best practises as captured by article 17 of the African Charter on Democracy, Elections and Good Governance, 2007 suggest that for there to be free and fair elections member states must commit to establish and strengthen independent and impartial national electoral bodies responsible for management of elections. There is need to establish and strengthen national mechanisms that redress election related disputes in a timely manner.

There is need to ensure fair and equitable access by contesting parties and candidates to state controlled media during elections. Also, there is need to ensure that there is a binding code of conduct governing legally recognised political stakeholders, government and other actors prior, during and after elections. The code includes a commitment by political stakeholders to accept the results of the election or challenge them through exclusively legal channels.

There is need for the courts to adopt an interpretation of the Constitutional principles for the electoral system and process under article 81(e) that best captures Kenya's electoral history. Constitutional autochthony therefore requires that the courts pay extra care to all the developments that have arisen in the course of the evolving Kenya's electoral history such as the emergence of electoral offences such as voter treating and bribery, electoral fraud, vote buying, voter ferrying, and fraudulent election financing among others. The mischief that article 81(e) seeks to cure are all these historical electoral malpractices. Therefore, courts should always endeavour to avert the re-occurrence of the same mistakes.

Some practical measures that can be taken to minimize the risks of electoral disputes in courts can include for instance the strengthening of the EMB and properly insulating it from external pressure if it is to call out electoral offences impartially and without fear. Voters must also be alert to the fact that the overall integrity of the electoral process depends on a large extent on their ability to be law abiding citizens who will not themselves be involved in electoral malpractices. EMBs should also ensure that voter rolls are regularly updated and available for public inspection. The entire voting process also needs to be designed to emphasize transparency, accessibility and efficiency so that overall accountability is ensured. Where this is achieved, the likelihood of disputes over the polling process and electoral outcomes can be minimised and thus having free and fair elections.

Once there is evidence of non-compliance with the Electoral laws, the election must be invalidated/ voided or annulled. The petitioner does not have to prove that the alleged "non-

compliance was substantial or not” Section 83 of the Elections Act, 2011 does not provide for the words “substantial compliance”. Those words are the inventions and innovation of the courts. All a petitioner needs to establish that there was non-compliance with the electoral process and therefore such an election should be voided. The conduct of elections within an arena of full compliance with electoral laws enhances the public confidences in the electoral process.

Section 83 of the Elections Act has two parts, the first part that the petitioner needs to satisfy for an election to be invalidated; the petitioner needs to establish that there has been non-compliance with the electoral laws. The second part requires that for an election to be invalidated, the non-compliance needs to affect the result of the election. Both parts of section 83 are disjunctive in nature; a petitioner need not prove both. Therefore for an election to be invalidated, petitioner only needs to establish that either there was non-compliance with electoral laws or that the non-compliance with electoral laws affected the results of the election.

It is trite that fraud vitiates everything. Where there is evidence of any electoral malpractice, fraud or manipulation regardless of whether it affects the outcome of an election or not; such an election must be invalidated. Likewise, such an election must be invalidated whether or not the beneficiary of the fraudulent act had a hand in the malpractice or not.

#### **5.4.2 With regard to applicable standard and burden of proof**

There is little or perhaps no contest with regards to the burden of proof in presidential election disputes. However, there is a major contestation with regards to the applicable standard of proof. The standard of “above balance of probabilities and below a standard of beyond reasonable doubt” is not certain. Such a standard cannot be definitely ascertained and would most often lead to an injustice towards the litigants as they may not be able to

determine with precision the standard to be used in their petition. Therefore, there is need to establish a definite standard of proof for electoral disputes.

Perhaps, the confusion in the applicable standard of proof can be attributed to the fact that election disputes are neither civil nor criminal. They are often referred to as suits *sui generis* (of a special kind). However, in fact there is nothing special in electoral disputes other than the fact that they are suits that draw interests from many quarters outside the litigants in court. This therefore calls for a definite classification of electoral disputes as either civil or criminal so that the criminal and civil aspects of the disputes are determined using their conventional respective standards applicable for criminal and civil disputes.

There is need for a shift in the burden of proof in electoral disputes to different parties with regards to different matters. For instance a petitioner/ victim of electoral malpractice should not be given the burden of proving alleged electoral malpractices. Such a burden should lie with the EMB that organised the election (and possibly occasioned the malpractices to happen). Once an allegation is made, the burden should be on the EMB to rebut it. The rationale for this proposal is that the petitioner who avers that an election was not held in accordance with the law cannot be required to prove the holding of the election by producing its results. It is the respondent who alleges that the election was free and fair that is under the obligation to tender the result of the election in proof of their assertion that the election was freely and fairly conducted and the results duly collated and declared.

#### **5.4.3 With regard to discretionary powers of Electoral Management Bodies and the Courts**

The courts should be able to bring the EMBs to account for their actions. Such accountability could be done within the context of checking what the legislative framework provides and what the EMB has done with regards a given conduct of the election. Such an approach will

lead to non – excusal of any infractions of the electoral law. The discretionary scope of the EMB should be limited only to the provisions of the law.

Strict emphasis should be given to electoral laws and particularly the language of the provision of section 83 of the Elections Act. That section provides that, “no election shall be declared to be invalid by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written law or that the non-compliance did not affect the result of the election”. It is proposed that the EMB and the courts should only concentrate with either the non – compliance with electoral law or the effect of the non-compliance with the electoral law on the results of the elections and not both.

#### **5.5: Suggestions for further studies**

This study recommends further study on the policy approaches to be adopted in the resolution of presidential election disputes. In that regard, this study recommends possible reforms of the electoral processes in future especially on the policy of judicial restraint before either annulling or upholding elections.

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## **APPENDIX 1: INTERVIEW GUIDE**

### **Introduction**

The nature of the interview to be conducted is a semi – structured interview. The choice of a semi structured interview is most suitable for this kind of study because of the qualitative nature of the study. That requires that the interview is focused on certain questions but with the scope for the respondents to express themselves at length.

### **Questions**

1. In your view, what is the trend emerging from the Kenyan judicial system with respect to resolution of presidential election disputes?
2. What do you think could be the reasons as to why the Kenyan judicial system consistently upholds presidential election petitions as opposed to annulling them where there are allegations of non – compliance with the electoral laws.
3. In your view, do you think the Kenyan judicial system has been exercising judicial restraint while resolving presidential election disputes as opposed to when they are resolving all other electoral disputes?
4. To what extent do you think judicial activism, non-justiciable political question doctrine and judicial independence has been a factor contributing to the Kenyan judicial system exercising judicial restraint in the resolution of presidential election disputes.
5. What are some of the policy challenges that may arise as a result of the Kenyan judicial system exercising judicial restraint?
6. Are there any areas of policy reform that you may propose?

## APPENDIX 2: QUESTIONNAIRES

### PART A: DEMOGRAPHICS

**1. What is your age group?**

- a) 1 – 25 years
- b) 26 – 36 years
- c) 36 – 45 years
- d) Above 45 years

**2. What is your gender?**

- a) Male
- b) Female

**3. What is your position?**

- a) Judicial officer
- b) Legal Practitioner
- c) Legal Researcher
- d) Member of the Civil Society
- e) Politician

### PART B

**4. Are you aware of any presidential election disputes that have been filed in the Kenyan Courts since independence?**

- a) Yes
- b) No

**5. If yes, kindly list any of the Presidential election petition disputes that have been filed in the Kenyan Courts?**

- .....
- .....
- .....
- 6. How do you agree with the following statements regarding the trends that have emerged from the judicial resolution of presidential election disputes? (where 5 is strongly agree, 4 – agree, 3 – neutral, 2 disagree, 1 – strongly disagree)**

	5	4	3	2	1
Courts usually readily annul presidential election disputes.					
Courts have been reluctant in annulling Presidential election petitions.					

- 7. To what extent do you think the following factors have contributed to how the Judiciary has been resolving presidential election disputes in Kenya? (where 5 is strongly agree, 4 – agree, 3 – neutral, 2 disagree, 1 – strongly disagree)**

	5	4	3	2	1
Judicial Restraint					
Non Justiciable politician question doctrine					
Judicial Activism					
Judicial Independence					

- 8. Please state other than the ones mentioned above that you think have contributed to how the Judiciary has been resolving presidential election disputes in Kenya**

.....

.....

.....

**9. How do you agree with the following statements as the possible implications that have arisen as a result of how the Judiciary has been resolving presidential election disputes in Kenya? (where 5 is strongly agree, 4 – agree, 3 – neutral, 2 disagree, 1 – strongly disagree)**

	<b>5</b>	<b>4</b>	<b>3</b>	<b>2</b>	<b>1</b>
It is unclear what amounts to non-compliance with electoral laws that may lead to nullification of a presidential election petition					
The applicable standard and burden of proof in presidential election petition disputes remains unclear					
The electoral management bodies and the courts have enlarged their discretionary powers when conducting and resolving presidential election disputes.					

**10. Please state any other implications that you think may arise out of resolution of presidential election disputes by the Kenyan Courts.**

.....

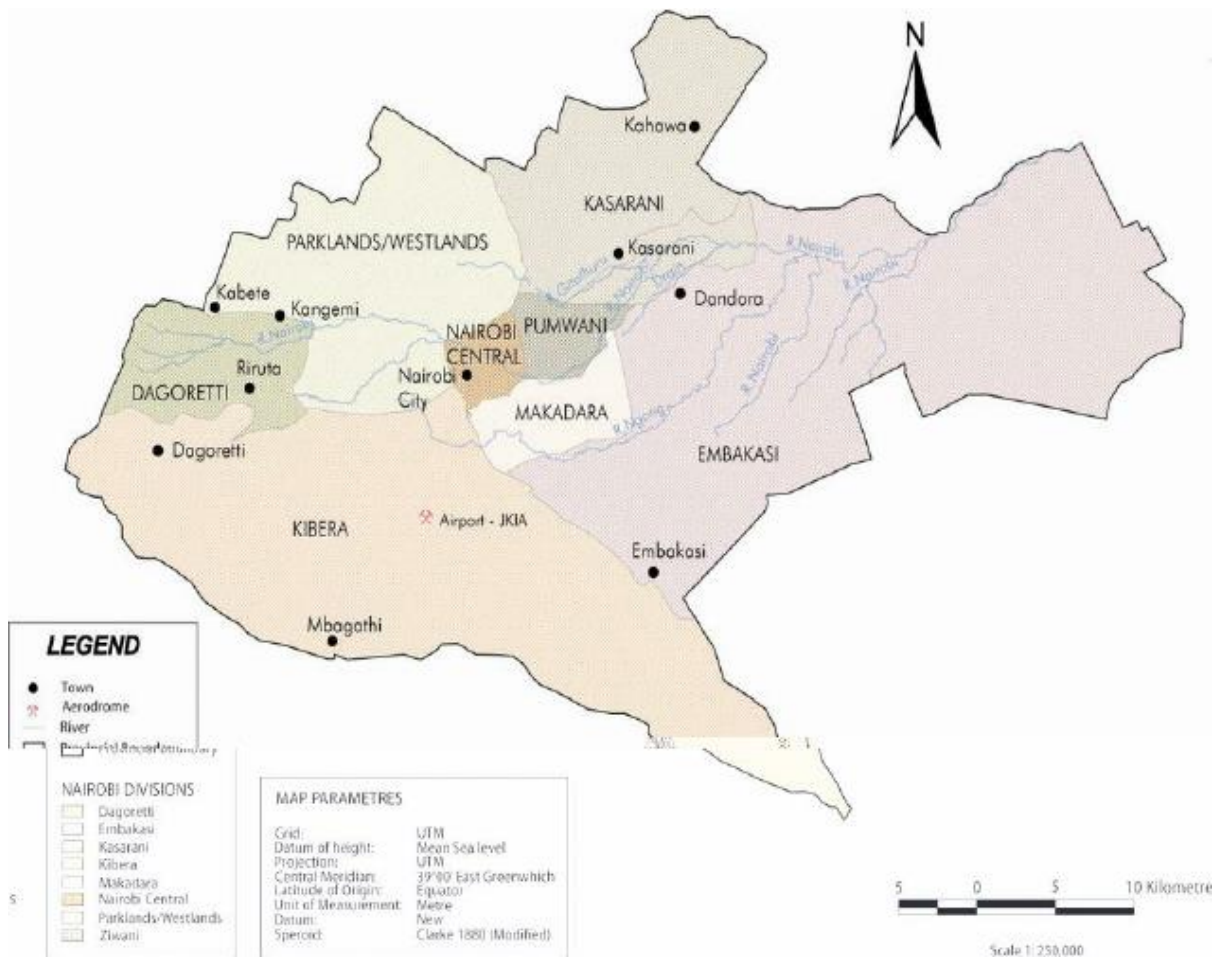
.....

.....

### APPENDIX 3: LIST OF RESPONDENTS

<b>CODE OF RESPONDENT</b>	<b>QUALIFICATION</b>	<b>PLACE OF ORAL INTERVIEW</b>
001	Politician	At a Restaurant
002	Member of Civil Society	At the Respondent's office
003	Legal Practitioner (Advocate)	Advocate's chambers
004	Judicial Officer	Court precincts
005	Judicial Officer	Court Precincts
006	Legal Practitioner (Advocate)	At a Restaurant

## APPENDIX 4: MAP OF NAIROBI CITY COUNTY



## APPENDIX 5: RESEARCH PERMIT

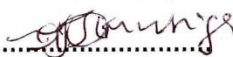
**THIS IS TO CERTIFY THAT:  
MR. TEDDY OTIENO MUSIGA  
of KENYATTA UNIVERSITY, 10443-100  
nairobi, has been permitted to conduct  
research in Nairobi County**

**Permit No : NACOSTI/P/16/35178/10606  
Date Of Issue : 18th April,2016  
Fee Received :ksh 1000**

**on the topic: IMPLICATIONS OF  
JUDICIAL RESOLUTION OF PRESIDENTIAL  
ELECTION DISPUTES**

**for the period ending:  
15th April,2017**



  
.....  
**Applicant's  
Signature**

  
.....  
**Director General  
National Commission for Science,  
Technology & Innovation**

### CONDITIONS

- 1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit**
- 2. Government Officers will not be interviewed without prior appointment.**
- 3. No questionnaire will be used unless it has been approved.**
- 4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.**
- 5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.**
- 6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice**



**REPUBLIC OF KENYA**



**National Commission for Science,  
Technology and Innovation**

### RESEARCH CLEARANCE

#### PERMIT

**Serial No. A 8684**

**CONDITIONS: see back page**



**NATIONAL COMMISSION FOR SCIENCE,  
TECHNOLOGY AND INNOVATION**

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9<sup>th</sup> Floor, Utalii House  
Uhuru Highway  
P.O. Box 30623-00100  
NAIROBI-KENYA

Ref. No. **NACOSTI/P/16/35178/10606**

Date:  
**18<sup>th</sup> April, 2016**

Teddy Otieno Musiga  
Kenyatta University  
P.O. Box 43844-00100  
**NAIROBI.**

**RE: RESEARCH AUTHORIZATION**

Following your application for authority to carry out research on ***“Implications of judicial resolution of presidential election disputes,”*** I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for the period ending **15<sup>th</sup> April, 2017.**

You are advised to report to **the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.

**DR. STEPHEN K. KIBIRU, PhD.**  
**FOR: DIRECTOR-GENERAL/CEO**

Copy to:

The County Commissioner  
Nairobi County.

The County Director of Education  
Nairobi County.

