

AFRICA RISK CONSULTING**Country briefing – Kenya****March 2013****1 Summary**

The Supreme Court orders recount in 22 tallying centres and continues to deliberate on petitions seeking to nullify victory of Uhuru Kenyatta in the general election. It is unlikely that the Court will order the elections to be held again. There will be a degree of political uncertainty in the short term as International Criminal Court (ICC) trial hangs over Kenyatta and new constitution takes effect. A deal is likely to be reached whereby ICC charges are dropped. Election of Kenyatta is welcomed by business and investment sectors.

1.1 Supreme Court likely to confirm Uhuru Kenyatta as next president

Raila Odinga's refusal to concede and petitions to nullify the outcome of the March 4 presidential election may have delayed **Uhuru Kenyatta's** assumption of office, but that remains the most probable outcome. The **Supreme Court** under chief justice **Willy Mutunga** has ordered a recount in 22 tallying centres but is likely to reject further action as called by the petitions filed by:

- the **Coalition for Reform and Democracy (CORD)**, citing the technical problems experienced by the **Independent Electoral and Boundaries Commission (IEBC)** during the tallying of votes, as well as amendments made to the electoral register between December 2012 and January 2013;
- the **Nairobi based African Centre for Open Governance** representing the influential civil society coalition **Kenyans for Peace, Truth and Justice**, on similar grounds;
- and three voters associated with the **Jubilee Coalition**, challenging the constitutionality of including spoilt ballots in the final tally.

Although a number of technical difficulties hit the IEBC on election day (*see February briefing*) and there are several examples of discrepancies between voting numbers and the electoral register, local and foreign observers continue to commend publically the transparency of the poll¹. The Supreme Court is likely to raise these irregularities but will conclude that these were not sufficient to overturn

¹ Reuters, 8 March 2013

the result, recognising electoral concerns so as not to antagonise the **Luo** backing Odinga, but not ordering a wider recount or rerun which would anger the **Kikuyu** and **Kalenjin** supporting Kenyatta.²

*“The petitions have merit but burden of proof will require CORD not only to demonstrate that the count was unfair but intentionally underhand. There are questionable constituencies in Kenyatta strongholds where the numbers of votes seem too high, but there are just as many questionable constituencies in Odinga strongholds. Proving intent will be nearly impossible and there is no obvious pattern of rigging”.*³

There are a number of options available to the Supreme Court which can uphold Kenyatta’s victory, order a wider recount than the initial 22 centres or instruct the IEBC to conduct fresh elections. Before the election, Willy Mutungu resisted attempts at political interference in the judiciary. He publically revealed that he and other judges had been subjected to threats including a letter signed by the self-styled **Mungiki Veterans/ Kenya Sovereignty Defence Squad** warning of “dire consequences” in the event of any judicial decisions to the detriment of Kenyatta’s candidacy⁴.

The only grounds on which the Supreme Court is likely to order the election to be held again is if it discovers genuine tallying errors within the recount at the initial 22 centres. Any discrepancy between the electronic counting and the manual tallying ordered due to the technical difficulties faced by the IEBC will mean that “*the Court has no choice but to order another election. If I were a betting man, I would put the odds of this at 20%*”⁵.

The Supreme Court has until 31 March to issue a final ruling. Odinga will have little option but to accept the ruling of the Supreme Court if he is to avoid accusations that he is disrupting Kenya’s political stability for no reason other than personal gain. Any re-election would see a low turnout and voters punishing Odinga for making the exercise necessary. Kenyatta would likely win a re-election⁶. Kenyatta is due to be sworn into office formally on 14 April.

1.2 Uncertain political future in the short- term

Even after the Supreme Court ruling, there will be a degree of uncertainty in Kenyan politics due to the impact of the new constitution and the **International Criminal Court (ICC)** trial of Kenyatta and his running mate, **William Ruto**, expected in July. Uncertainty about the effect of the 2010 constitution includes questions about how effective the new ministers will be now that they are not elected politicians, whether the **Provincial Administration** will be kept in the new

² Source, Journalist, Nairobi.

³ Source: Senior oil executive, London

⁴ Financial Times, 20 February 2013

⁵ Source: Senior oil executive, London

⁶ Source: Senior oil executive, London

system, and how the central government will work with the counties under the new system of devolution. While Kenyatta will have a working majority in parliament, he will be forced to toe a conciliatory line if he is to keep his coalition intact while answering these questions. Kenyatta's party controls only 73 of the 290 parliamentary seats. He will require the continued support of Ruto's **United Republic Party** with 62 members, as well as a number of minor parties.

The ICC trial of Kenyatta and Ruto is another source of uncertainty in Kenyan politics. It seems unlikely that either Ruto or Kenyatta would agree to travel to **The Hague** and some form of deal whereby the charges are dropped is most likely⁷. While Odinga in his acceptance speech said that he would cooperate with international institutions, he qualified the comment by saying that the "international community must respect Kenya's sovereignty"⁸. A diplomatic source in Nairobi indicated this might be a nuanced message to the West, suggesting an elected leader should not be subject to the humiliation of a trial in **Europe**⁹. Any refusal to travel to The Hague would put Kenyatta in the same boat as President **Omar Hassan al-Bashir of Sudan**. The main difference would, however, be that western governments cannot afford to alienate the leadership of Kenya, a key regional ally particularly in the fight against Islamist militancy. The ICC withdrew charges similar to those facing Kenyatta on 11 March against **Francis Muthaura**, a former head of Kenya's civil service and ally of Kenyatta in 2007¹⁰. Prosecutor **Fatou Bensouda** said several prosecution witnesses were too afraid to testify, while another had recanted his evidence having admitted to accepting bribes¹¹. Bensouda criticised the Kenyan government for not cooperating with the ICC and for not providing evidence as requested.

1.3 But business sector will continue to grow unabated under Kenyatta

Despite the ICC indictment, Kenyatta's election is not likely to have a negative impact on the investment environment for foreign companies in Kenya.

"He has everything to please western leaders: western educated, articulate, well-spoken, favours suits and has a wife who does not seek the limelight. He is apparently intelligent and charismatic, and pragmatic enough to continue working with any foreign powers who insinuated prior to the polls that voters should choose another candidate"¹².

⁷ Source: Journalist, Nairobi

⁸ VOA, 10 March 2013

⁹ Source: Western diplomat, Nairobi

¹⁰ AP, 11 March 2013

¹¹ Daily Nation, 11 March 2013

¹² Source: Journalist, Nairobi

During the campaign, Kenyatta revealed little of his fiscal or business policies. There is, however, little to suggest that Kenyatta, should his victory be confirmed, will implement a significant change of direction in policy. The **Central Bank** has proved adept at keeping the Kenyan shilling steady, and this experience will ensure it continues to steer fiscal policy. The ICC trial and new constitution may ensure a degree of political confusion but this is will not shake Kenya's stable exchange rate or stall the country's growth, with **Morgan and Stanley** predicting that the economy will grow by 5% this year. According to an ARC source, many investors positioned themselves to invest in Kenya after the elections and the lack of violence will have encouraged them about the country's prospects¹³.

*"Politics may be confused and complex but the business community will continue in the background unaffected. This was the best result that the business community could hope for; one round, no violence, and Odinga who would very have been 'jobs for the boys' lost. While Kenyatta will also have to reward his backers, these are concentrated around Nairobi so the country as a whole will benefit."*¹⁴

2 Implications

Despite ordering a partial recount, the Supreme Court is likely to confirm Uhuru Kenyatta as Kenya's next president. Odinga is expected to accept the decision. Should there be evidence of widespread tallying errors or malpractice, the Supreme Court would have little choice but to order another vote. A second election would likely be won by Kenyatta, with an electorate punishing Odinga for not accepting the first set of results gracefully.

By requesting a limited recount, the Supreme Court has acted in a sensible and measured manner, symptomatic of an independent judiciary renewed by the new constitution. This maturity bodes well for the future of Kenya's political institutions under the new system. There is, however, likely to be policy drift and political limbo until the Court issues its final ruling and Kenyatta assembles his team of ministers.

When Odinga delivered his petition to the Supreme Court, police used tear gas to break up protests by his supporters¹⁵. Protests should be expected when the Supreme Court delivers its final verdict. Both Odinga and Kenyatta have, however, continued to call for restraint amongst their supporters, and widespread violence on the scale of 2007- 2008 remains unlikely. There is likely to be a degree of political uncertainty due to the ICC trial and the new constitution but these will be resolved within the next 12 months. A political deal by which Kenyatta's ICC trial is either delayed or dropped entirely is also probable.

¹³ Source: Senior international finance official, Nairobi;

¹⁴ Source: Senior oil executive, London

¹⁵ Reuters, 17 March 2013

