

AFRICA RISK CONSULTING

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Kenya Summary 5 September 2017

President Uhuru Kenyatta (2013-present) wins the 8 August presidential election with 54% of the vote. Opposition National Super Alliance (NASA) candidate Raila Odinga alleges electoral fraud. The Supreme Court finds that the election breached constitutional norms and nullifies Kenyatta's victory. The Independent Electoral and Boundaries Commission (IEBC) schedules a rerun, which Kenyatta and Odinga alone will contest, on 18 October. It is unclear if this is sufficient time for the IEBC to restore its credibility with the opposition: much will depend on the contents of the Supreme Court's full judgement which it will release before 22 September. The Nairobi Securities Exchange is in step with political developments, and businesses are concerned that political uncertainty will harm economic growth. The Supreme Court ruling is, however, positive for Kenya's long-term political risk profile.

Kenyatta wins presidential election...

The **Supreme Court** nullified the result of the 8 August presidential election on 1 September and ordered a rerun, which the **Independent Electoral and Boundaries Commission (IEBC)** subsequently scheduled for 18 October.¹ The long-term significance of the nullification is the increased independence of **Kenya's** political institutions, but in the short-term, the ruling will extend the political and investor uncertainty around the general election into the fourth quarter of the year. The IEBC had announced on 11 August that incumbent President **Uhuru Kenyatta** (2013-present) received 8,203,290 votes (54.27%) and opposition **National Super Alliance (NASA)** candidate **Raila Odinga** 6,762,224 votes (44.74%).² Kenyatta met the constitutional threshold of more than 50% of votes cast and at least 25% of votes in 24 counties required to win the presidential election.³ Kenyatta and the ruling **Jubilee Party** performed better than expected, and made significant inroads in opposition strongholds.

*"Jubilee successfully managed to increase their share into predominantly NASA strongholds in the **Western** and **Coastal** regions through a mix of political adeptness, massive deployment of resources and pork barrel politics, coupled with the opposition's inability to translate popularity into actual votes."*⁴

There were, however, questions about the legality of some of the Jubilee Party's tactics.

*"Months to the election the government, against election rules, bought airtime on all prime-time media slots, across all platforms advertising its achievements. Whereas the election law is explicit and bans any advertisement promoting government achievement on any platform, Jubilee went ahead with the massive campaign, including rolling out a portal to track projects, under the guise that it was giving citizens access to information. The cost of this campaign was at the expense of the taxpayer. On financing, Jubilee raised eyebrows when it was revealed **Kenya***

¹ Daily Nation, 1 Sept 2017.

² Capital News, 11 Aug 2017.

³ Capital News, 11 Aug 2017.

⁴ Source, journalist, Nairobi

*Revenue Authority commissioner general **John Njiraini** was on the party's fundraising committee, an act that is contrary to the law.”⁵*

Combining the opposition parties under the NASA banner did not unite the opposition vote.

*“Odinga’s running mate, **Kalonzo Musyoka**, [and NASA figureheads] **Moses Wetangula**, **Musalia Mudavadi** and **Isaac Ruto** failed to mobilise their bases for an Odinga win. Kalonzo’s **Wiper Party** lost all its governorships while Isaac Ruto was not even able to retain his seat losing to a Jubilee candidate.”⁶*

Odinga, however, immediately denounced the IEBC’s results as “fictitious” and “fake”.⁷ Odinga blamed electoral fraud for his defeat, alleging that unspecified individuals hacked the IEBC servers, inserting an algorithm to manipulate the results and ensure Kenyatta maintained a constant lead throughout the vote tallying.⁸ NASA linked the alleged hacking to the murder of IEBC data centre and infrastructure manager and acting information and communications technology (ICT) director **Christopher Chege Msando** who was declared missing on 29 July.⁹ Msando’s body was found naked and with apparent signs of torture in **Kikuyu (Kiambu County)** on the same day.¹⁰ Senior **East African** international election observers privately back opposition allegations that the timing and nature of Msando’s murder may be part of a broader electoral conspiracy.¹¹ However, in the immediate wake of the election, NASA appeared unable to put forward credible evidence of electoral fraud:

*“NASA produced printed documents showing logs into the IEBC database in the early morning hours. But there was one problem, NASA’s printed documents showed a system that was operating using a **Microsoft**-based system yet IEBC uses an **Oracle** one.”¹²*

While the security situation remained stable for the most part, the announcement of the election results triggered localised clashes between NASA supporters and security forces. There were protests across 11 and 13 August in **Siaya, Homa Bay, Migori, Kisumu** and **Nairobi** counties.¹³ In **Nairobi**, most clashes were concentrated in urban informal settlements in **Mathare, Kibera, Kawangware, Korogocho, Dandora** and **Lucky Summer**, where protesters blocked roads or destroyed property.¹⁴ Security forces responded heavy-handedly to the protests. The **Kenya National Commission on Human Rights (KNCHR)** chairman, **Kagwiria Mbogori**, said on 12 August that security forces had killed 24 people since the election.¹⁵ The KNCHR says the majority of deaths were in Nairobi, where 17 people were killed, including allegedly a nine-year-old child.¹⁶ The government, however, claims only 10 people died.¹⁷

Opposition protests, however, appeared to be losing momentum. NASA called for a general strike on 14 August, but the response in most urban areas was limited with businesses re-opening after the election period as expected.¹⁸ Odinga announced on 16 August that he would challenge the election result through the courts rather than through protests or labour action.¹⁹ There was, however, a sense

⁵ Source, journalist, Nairobi

⁶ Source, journalist, Nairobi

⁷ Standard, 9 Aug 2017.

⁸ Capital News, 11 Aug 2017.

⁹ Daily Nation, 29 Jul 2017.

¹⁰ Daily Nation, 29 Jul 2017.

¹¹ Source, international election observer mission staff, East Africa

¹² Source, journalist, Nairobi

¹³ Daily Nation, 14 Aug 2017.

¹⁴ Daily Nation, 14 Aug 2017.

¹⁵ The Star, 14 Aug 2017.

¹⁶ The Star, 14 Aug 2017.

¹⁷ The Standard, 14 Aug 2017.

¹⁸ Reuters, 14 Aug 2017.

¹⁹ Daily Nation, 16 Aug 2017.

that Odinga's Supreme Court challenge was borne from personal political ambition as much as genuine grievance.

*"The challenge appeared to reinforce the 'Raila Doctrine' which states that an election is only credible if Raila wins. There was scepticism that Odinga's decision to go to court was driven by an unfulfilled ambition of becoming president after four failed attempts. The 2007 loss that nearly drove Kenya to civil war and the 2013 election that was determined by the Supreme Court were the closest Odinga has come to winning the top seat. In this election however, NASA's loss at all levels of government, made the case for a stolen election a difficult one. Jubilee successfully managed to make inroads in NASA strongholds, winning Kenyatta a majority in the **National Assembly**, the **Senate**, [and a] majority of governors and women representatives. International observers all said that the poll was free and fair."*²⁰

This scepticism was despite Kenyatta's actions following the election raising the possibility that his administration had something to hide. The government, on 14 August, instructed the **NGO Board** to deregister the **Kenya Human Rights Commission (KHCR)** and the **Africa Centre for Open Governance (AfriCog)**.²¹ The KHCR was preparing to petition the Supreme Court to invalidate the election result, while AfriCog was investigating the murder of Msando.²²

Most legal and political analysts, including **Kenya School of Law** director **Patrick Lumumba**, expected the Supreme Court to uphold Kenyatta's victory as NASA would need to prove that electoral fraud or mismanagement was sufficient to change the result. The limited timeframe the opposition had to prove its case, the high burden of proof required, and the cost and disruption of a second election, all counted against NASA.²³

... before Supreme Court nullifies his victory

NASA filed its Supreme Court petition on 18 August, the deadline for doing so. The delayed filing was reportedly due to divisions in the senior echelons of NASA about whether to challenge the result in the courts or on the streets. The Supreme Court began to hear the NASA presidential election challenge on 28 August, a day later than originally scheduled.²⁴ The case named Kenyatta, the IEBC, and IEBC chairman **Wafula Chebukati** as respondents.²⁵ Chief Justice **David Maraga** led the seven judges of the Supreme Court. On the first day of the hearing, the NASA won a procedural victory when the court ruled that the NASA legal team should have limited access to the IEBC computer servers and electronic voter kits.²⁶ The NASA alleges that manipulation of the IEBC computer system and the **Kenya Integrated Elections Management System (KIEMS)** distorted the result tallying process and resulted in Kenyatta's victory.²⁷ It appears that the IEBC did not fully comply with the court order to allow access to its computer systems.²⁸

NASA's legal team, especially senior party official and lawyer **James Orengo**, focused on the transmission of results.²⁹ The transmission of results has traditionally been a source of tension in Kenya, as well as in other **East African** elections, as it is the electoral process most vulnerable to fraud.³⁰ Previously, there have been instances whereby results announced at the main tallying centre differed from those relayed at the polling stations.³¹ For this election, the IEBC introduced the KIEMS

²⁰ Source, journalist, Nairobi.\

²¹ Daily Nation, 14 Aug 2017.

²² Daily Nation, 14 Aug 2017.

²³ Africa Confidential, 21 Aug 2017.

²⁴ Daily Nation, 28 Jul 2017.

²⁵ Daily Nation, 18 Aug 2017.

²⁶ Daily Nation, 28 Jul 2017.

²⁷ Daily Nation, 28 Jul 2017.

²⁸ Daily Nation, 1 Sept 2017.

²⁹ Daily Nation, 28 Jul 2017.

³⁰ Source, international election observer mission staff, East Africa.

³¹ Source, international election observer mission staff, East Africa.

electronic kits. The KIEMS used biometric data to identify voters and reduce the risk of multiple voting. The kits sent details on the number of voters who had had their data scanned every three to four hours. This would make it impossible for election official to transmit results with figures more than registered voters at any polling station.³² The election day itself passed without significant incident. Despite isolated incidents of technical difficulties and delays at polling stations, there were no significant issues compared to the 2013 election.³³ Anecdotal evidence from a limited sample of polling stations indicates, however, that the KIEMS failed to stop significant discrepancies between the number of votes cast during election day and the number of votes that appeared on the final electronic tallies.³⁴ This was central to the Supreme Court case,

“The court proceedings also showed instances where votes cast at the presidential level exceeded those cast at the governor and other levels, implying that there could have been instances where votes were inflated at the top to favour certain candidates.”³⁵

There was a manual vote tallying process to corroborate the electronic vote.³⁶ Election officials at each polling station were required to fill a form called 34B that indicates the number of votes that each candidate – at all levels of the general election – received. IEBC officials and respective party agents would confirm votes cast and sign the forms, which would then be scanned and sent to the election official at the county level.³⁷ The scanned forms were then supposed to be uploaded on the IEBC website. At the constituency level, all the form 34Bs are compiled, and election officials then complete another form called form 34A. It is the form 34A that would determine the result.³⁸ The law requires that the IEBC chairman only announces results when all data from all polls is added.³⁹

Chebukati announced that Kenyatta had won the election before the IEBC had received approximately 25% of the 34A and 34B forms.⁴⁰

“Days after IEBC’s announcement there were still some results from thousands of polling stations that had not yet come.”⁴¹

The legal team for the IEBC and Kenyatta argued that, although there were procedural errors, the votes cast reflected the will of the people.

The Supreme Court bench voted 4-2 to overturn Kenyatta’s victory. The Supreme Court cited irregularities in the IEBC counting and transmission of results.⁴² Maraga said the IEBC had,

“... failed, neglected or refused to conduct the presidential election in a manner consistent with the dictates of the constitution.”⁴³

This, according to Maraga, rendered the presidential election result *“invalid, null and void”*.⁴⁴ In effect, the Supreme Court ruled that the IEBC,

“... so badly conducted the election that it would not be possible to ascertain the validity of the results.”⁴⁵

³² Source, international election observer mission staff, East Africa

³³ Source, political analyst, Kenya

³⁴ Source, investigator, Kenya

³⁵ Source, journalist, Nairobi

³⁶ Source, journalist, Nairobi

³⁷ Source, journalist, Nairobi

³⁸ Source, journalist, Nairobi

³⁹ Source, journalist, Nairobi

⁴⁰ Source, international election observer mission staff, East Africa.

⁴¹ Source, journalist, Nairobi

⁴² Daily Nation, 1 Sept 2017.

⁴³ The Star, 1 Sept 2017.

⁴⁴ The Star, 1 Sept 2017.

⁴⁵ Source, journalist, Nairobi

The ruling was a boost for the independence and credibility of the Supreme Court. It is a “*fundamentally different*”⁴⁶ body from the one that ruled in Kenyatta’s favour in 2013. Two justices, who sat in 2013 but subsequently faced integrity questions, have retired. Justice **Philip Tunoi** was accused of accepting a \$2m bribe to influence the decision on an election petition between Nairobi Governor **Evans Kidero** against **Ferdinand Waititu** in 2013. Tunoi opted to retire in 2016 to avoid facing a tribunal investigating the allegations. Supreme Court deputy chief justice **Kalpana Hasmukhrai Rawal** also retired in 2016 after leaked documents from the **Panama Papers** showed that she was a director at a firm that bought an £8m (\$10.3m) apartment in **London (United Kingdom)** in 2004, raising questions about how a civil servant could afford real estate.⁴⁷ Former Chief Justice **Willy Mutunga** also retired in 2016 and, while there were no integrity concerns around him, his decision to retire was to avoid handling another presidential petition.⁴⁸ Mutunga’s successor, **David Maraga**,

*“... is strict and has a low tolerance from administrative blunders as seen from his past judgements. Law scholars believe the IEBC and Kenyatta’s legal team did not seriously take this into consideration.”*⁴⁹

Analysts have cited the unprecedented nature of the ruling and the demonstration of judicial independence as indicative of Kenya’s maturing democracy.⁵⁰ Since the ruling, Kenyatta has repeatedly pledged to respect it.⁵¹ However, Kenyatta has also repeatedly attacked the judiciary, in an apparent attempt to incite Jubilee Party supporters against the judiciary, thereby increasing the risk of violence. At a rally at **Burma** market in Nairobi immediately after the ruling, Kenyatta described the Supreme Court justices as “*wakora*” (Kiswahili for crooks).⁵² In a live television broadcast on 2 September, Kenyatta addressed the IEBC justices,

*“Who even elected you? We have a problem and we must fix it.”*⁵³

How Kenyatta might retaliate against the judiciary is unclear,

*“... as Supreme Court judges are hired and disciplined by the **Judicial Service Commission**, an independent body that is made up of members representing different parties including the legal fraternity. The chief justice also chairs the Judicial Service Commission.”*⁵⁴

The Supreme Court has proved that it is unwilling to bow to political pressure. The ruling is therefore a boost for Kenyan judicial independence, a key barometer of long-term political stability.

Markets remain tied to political developments

Portfolio investment into Kenya’s capital markets as well as the shilling have followed political developments since the election and will continue to do so until the rerun is completed. The peaceful conduct of the election and Kenyatta’s sizeable majority initially strengthened the Kenya shilling. At commercial banks, the shilling was trading at 103.70/90 to the dollar on 9 August compared to 103.95/104.05 at the close on 7 August.⁵⁵ **Standard & Poor’s** said on 9 August that it does not expect violence on the same scale as 2007, and therefore the election will not affect Kenya’s B+ credit rating and stable outlook.⁵⁶

⁴⁶ Source, journalist, Nairobi

⁴⁷ Daily Nation, 4 Apr 2016.

⁴⁸ Daily Nation, 4 Apr 2016.

⁴⁹ Source, journalist, Nairobi

⁵⁰ Source, journalist, Nairobi

⁵¹ Daily Nation, 2 Sept 2017.

⁵² www.NairobiNews.com

⁵³ KTN, 2 Sept 2017.

⁵⁴ Source, journalist, Nairobi

⁵⁵ Reuters, 9 Aug 2017.

⁵⁶ Reuters, 9 Aug 2017.

After Kenyatta's victory was announced, investors welcomed his sizeable majority, as it will mean less uncertainty than either a smaller margin or a leftist Odinga victory. In the week following the election, the **Nairobi Securities Exchange's** main **NSE-20** index rose 7% to reach a 14-month high.⁵⁷ Investor concerns had resulted in an accumulation of liquidity that will now enter the market.

Following the Supreme Court ruling, however, the NSE briefly suspended trading on 1 September after shares fell 10% triggering the circuit breaker.⁵⁸ The NSE-20 decreased 3.5% by the close.⁵⁹ The Kenya shilling decreased 0.4% to trade at 103.10/20 to the dollar, compared to 102.75/95 to the dollar at the close of 31 August.⁶⁰ The Kenya shilling was 104 to the dollar prior to the election.⁶¹ Kenya's \$2 billion sovereign bond maturing in 2024 fell 1.3 cents, and the 2019 issue 0.75 cents.⁶²

While ongoing infrastructure projects are well insulated from political risk, portfolio investments will remain volatile. A prolonged period of electioneering may extend the economic and business slowdown that started towards the third quarter of the year.

Next steps

By nullifying the election, the Supreme Court gave the IEBC 90 days in which to hold new elections. The IEBC announced on 4 September that the election will take place on 18 October.⁶³ The IEBC confirmed that only Kenyatta and Odinga will contest the rerun.⁶⁴ Before then, the Supreme Court has 21 days (until 22 September) from its ruling to publish its full judgement. The full judgement will have implications for both the organisation of the second election and the electoral prospects of Kenyatta and Odinga. It is unclear whether the current IEBC has the credibility to oversee the rerun election. Odinga has called for IEBC officials to face prosecution for their mismanagement of the initial election process, and for Chebukati and IEBC CEO **Ezra Chiloba** to resign.⁶⁵ Chebukati, has rejected calls to resign but said on 1 September that the IEBC will make unspecified changes to its personnel and internal processes ahead of the rerun.⁶⁶ Whether this is sufficient to placate the NASA will depend on the full judgement. Odinga threatened on 5 September to boycott the rerun if he does not receive unspecified "*legal and constitutional guarantees*" about their conduct.⁶⁷ Significant reform of the IEBC is difficult in the remaining days ahead of the rerun. Evidence of Jubilee Party involvement in electoral fraud will damage the credibility of Kenyatta and boost Odinga ahead of the rerun.

Kenya enters a period of political limbo. It is unclear if the IEBC has the time or inclination to make the changes that the opposition requires to have confidence in it. If the IEBC lacks authority, it will increase the risk of further allegations of electoral fraud and the risk of violence. The rerun election is too close to call. Much will depend on the Supreme Court's full judgement. However, Kenyatta's capacity to make inroads into opposition strongholds suggests that, unless the Supreme Court judgement levels serious allegations against Kenyatta or Jubilee Party senior officials, he should enter the rerun as narrow favourite.

Planner

2018 **(Kenya)** *Capital FM*. Construction of **Nairobi-Mombasa** express highway due to begin;
14 – 16 March 2018 **Nairobi (Kenya)** *Press release*. **East Africa Oil & Gas Summit 2018**;

⁵⁷ Reuters, 15 Aug 2017.

⁵⁸ Daily Nation, 1 Sept 2017.

⁵⁹ www.nse.co.ke

⁶⁰ www.nse.co.ke

⁶¹ Reuters, 15 Aug 2017.

⁶² www.TradeWeb.com.

⁶³ Daily Nation, 4 Sept 2017.

⁶⁴ IEBC statement, 4 Sept 2017.

⁶⁵ Reuters, 1 Sept 2017.

⁶⁶ Daily Nation, 2 Sept 2017.

⁶⁷ BBC, 5 Sept 2017.

Dec 2017 **(Kenya)** *Daily Nation*. Direct flights with **United States** expected to begin;

Oct 2017 **(Kenya)** *Kenya Met Department*. **Kenya Met Department** expects heavy rains to begin and last until December;

16 Oct 2017 **(Kenya)** *Standard*. Rerun of presidential election;

22 Sept 2017 **Nairobi (Kenya)** *Daily Nation*. Supreme Court to publish full judgement in presidential election case.

Chronology

5 Sept 2017 **Nairobi (Kenya)** *BBC*. Opposition **National Super Alliance (NASA)** candidate **Raila Odinga** says he may boycott rerun unless he receives unspecified “*legal and constitutional guarantees*”;

4 Sept 2017 **Nairobi (Kenya)** *Daily Nation*. The **Independent Electoral and Boundaries Commission (IEBC)** sets 18 October as date for rerun election;

1 Sept 2017 **Nairobi (Kenya)** *Reuters*. **Supreme Court** nullifies election win of President **Uhuru Kenyatta** (2013-present) and orders rerun within 90 days, forcing 10% drop in **Nairobi Securities Exchange**;

31 Aug 2017 **Nairobi (Kenya)** *Standard*. **National Assembly** and **Senate** convene for first time since general election and appoint **Justin Muturi** and **Ken Lusaka** as respective speakers;

28 Aug 2017 **Nairobi (Kenya)** *Daily Nation*. Supreme Court begins to hear NASA case seeking to annul presidential election;

28 Aug 2017 **Western (Kenya)** *DPA*. **Human Rights Watch** accuses security forces of human rights abuses in opposition heartlands following IEBC announcement of results;

28 Aug 2017 **Nairobi (Kenya)** *Daily Nation*. Supreme Court delays NASA case seeking to annul presidential election by one day;

27 Aug 2017 **Nairobi (Kenya)** *Standard*. The **Central Bank of Kenya (CBK)** says 12 banks are in breach of banking liquidity regulations, but increases sector rating from satisfactory to strong;

27 Aug 2017 **Nairobi (Kenya)** *East African*. The **East African Community** says Kenya’s non-tariff trade barriers increased from 10 to 23 in 2016;

25 Aug 2017 **Nairobi (Kenya)** *Standard*. **Kenya Electricity Generating Co (KenGen)** appoints **Rebecca Miano** as acting managing director and CEO;

21 Aug 2017 **(Kenya)** *Daily Nation*. Governors begin to be sworn in, including new **Nairobi County** governor **Mike Mbuvi Kioko** and deputy governor **Polycarp Igathe**;

21 Aug 2017 **(Kenya)** *East African*. **Total E&P** says it may use **Uganda-Tanzania** oil export pipeline for Kenyan crude oil rather than the proposed **Lamu Port-South Sudan-Ethiopia-Transport Corridor (Lapsset)** pipeline;

18 Aug 2017 **Nairobi (Kenya)** *Daily Nation*. NASA meets deadline to file case at Supreme Court seeking to annul presidential election;

14 Aug 2017 **(Kenya)** *Reuters*. NASA call for general strike fails to gain traction;

11-13 Aug 2017 **(Kenya)** *Reuters*. Announcement of Kenyatta victory triggers localised protests in **Siaya, Homa Bay, Migori, Kisumu** and **Nairobi Counties**;

11 Aug 2017 **Nairobi (Kenya)** *Daily Nation*. IEBC chairman **Wafula Chebukati** declares Kenyatta

winner of presidential election with 54.27% of the vote;

9 Aug 2017 **(Kenya)** *Press release. Standard & Poor's* says conduct of election means it will not affect Kenya's B+ credit rating and stable outlook;

8 Aug 2017 **(Kenya)** *Reuters*. General election passes relatively smoothly and without significant incident;

5 Aug 2017 **Nairobi (Kenya)** *Standard*. **National Oil Corp** appoints **Mary Jane Mwangi** as CEO;

4 Aug 2017 **Nairobi (Kenya)** *Standard*. **Kenya Power & Lighting Co Ltd** retains **Ken Tarus** as CEO;

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