



EISA Election Observation Mission to the 2022 General Elections in the Republic of Kenya

Preliminary Statement

11th August 2022

1. 1 INTRODUCTION

1.1 Invitation to Observe General Elections 2022

The national authorities of the Republic of Kenya invited the Electoral Institute for Sustainable Democracy in Africa (EISA) to observe the General Elections scheduled for the 9th August 2022 in accordance with the Kenya Electoral Act.

In line with its mandate of strengthening co-operation amongst key electoral stakeholders in the African region, EISA deployed a Short-Term Election Observation Mission comprised of 21 Short-term observers (STOs), mainly drawn from Election Management Bodies (EMBs), Civil Society Organisations (CSOs), and academia from across the continent. The Mission is headed by His Excellency Goodluck Jonathan, former President of the Federal Republic of Nigeria and deputised by Mr. Baïdessou Soukolgue, the EISA's Executive Director, and supported by a coordination and technical team.

Consistent with the Declaration of Principles (DoP) for International Election Observation, the EISA International EOM presents its Preliminary Statement containing a summary of its preliminary observations and conclusion made up to the close of the count and reconciliation of presidential ballots witnessed in its sampled polling stations in 10 of Kenya's 47 counties. This preliminary statement is issued to the Government of Kenya, Independent Electoral and Boundary Commission (IEBC), other relevant public institutions involved in the elections, political parties and independent candidates, civil society organisations, the security agencies, and citizens of Kenya. EISA emphasises that the Kenya 2022 general elections are yet to be concluded, hence a full report will be released after the conclusion of the electoral process.

1.2 The Mandate of the EISA IEOM

Through accreditation by the IEBC the EISA IEOM is mandated to make an independent observation and assessment of the integrity of Kenya's 2022 general elections and to assess whether these elections were conducted in line with Kenya's national electoral framework for and international and regional commitments to democratic elections. EISA Mission's assessment of the ongoing electoral process is

based on the principles and obligations for democratic elections stipulated in the relevant international standards and benchmarks, including but not limited to the African Union (AU) Declaration on the Principles Governing Democratic Elections; the African Charter on Democracy, Elections and Governance (ACDEG); the Principles for Election Management, Monitoring and Observation (PEMMO); and Kenya's legal framework for elections. EISA's observation methodology is guided by the Declaration of Principles for International Observation (DOP) and its accompanying code of conduct for observers.

In its observation of the Kenya 2022 general elections, the EISA IEOM consulted widely at political and technical levels with various state and regulatory authorities and non-state election stakeholders in Nairobi and the counties where its observer teams were deployed to strengthen its understanding of the ongoing electoral process.

The EISA IEOM reiterates that the electoral process in Kenya is still ongoing, and its preliminary statement recognises that critical processes such as results transmission and verification are yet to be concluded by the relevant authority.

1.3 EISA IEOM Approach and deployment

To complement its observation and engagement with the electoral stakeholders, the Mission undertook a documentary review complemented by assessments of media reports to get insights on the historical background, legal framework, and general electoral landscape under which the elections were being held from June to July 2022 through a pre-election assessment mission.

Prior to their deployment EISA observers were briefed by various national election stakeholders and trained on EISA's election observation methodology aligned with the principles set out in the Declaration of Principles for International Election Observation and the Code of Conduct for International Election Observers. The technical briefing of EISA observers was complemented by the high-level meetings of the Head of Mission with the leadership of relevant national state and non-state institutions.

The EISA IEOM deployed 12 observer teams from 5th to 10th August 2022 to 07 regions in the following 10 counties: Nairobi City, Kakamega, Kiambu, Kitui, Kwale, Makueni, Nakuru, Nandi, Nyamira, and Uasin Gishu. On Election Day, the EISA EOM observed all election day procedures from the opening of polls to the counting of votes in a total of 187 polling stations sampled prior to their deployment to the counties. The deployment strategy enabled EISA to access polling stations that have not been observed by international observers in any election before. The observers were equipped with smart tablets that enabled them to collect and transmit election observation data to the EOM coordination centre in Nairobi in real time.

2. Political environment

The Republic of Kenya held its general elections on the 9th of August 2022, the third of which were being held based on the 2010 Constitution and the first of which were being held in full compliance of the same. The 2022 general elections were held on the backdrop of disputed 2017 elections whose rerun had been boycotted by the main

opposition coalition. The Mission notes that the political context leading up to the 2022 elections was heavily affected by the nullification of the 2017 presidential election by the Supreme Court.

The Mission further notes that the political context ahead of the general elections is shaped by the end of the second and final presidential term of the incumbent, growing tensions at the Executive Branch level following a handshake between the incumbent and the former leader of the opposition and ensuing political realignment. The 2022 general elections were held within a context marked by increased political polarisation and the emergence of Azimio La Umoja, a coalition political party, and Kenya Kwanza, a coalition of political parties.

The political context was also characterised by a high level of political competition in view of the number of presidential hopefuls who filed their candidate nomination with the relevant authorities.

3. Constitutional and Legal background

Kenya's General elections are governed and conducted based on a legal framework comprised of legislation, and the international normative framework for free, fair, credible, and transparent democratic corner stones. The Supreme law of Kenya provides that the general rules of the international law and any treaty or convention ratified by Kenya shall form part of the country's legal framework that includes the 2010 Constitution of the Republic of Kenya, the 2011 Electoral Act, the 2011 Political Parties Act, the 2011 Independent Electoral and Boundaries Commission Act, the 2016 Electoral Law Amendment Act, the 2016 Election Offences Act, the 2017 Elections Law Amendment Act, the Leadership and Integrity Act 2012, The Supreme Court No. 11 of 2011, Electoral Regulations/ Subsidiary Law Number 24 of 2012, and the Public Order Act of 1951. Kenya has ratified the key international and African Human Rights instruments pertaining to elections.

EISA noted that the Kenya legal framework for elections largely gives effect to regional and international standards for elections which include the right to vote and to be voted for, the right to free and fair elections, an independent election management body and fundamental freedoms that allow for free will of the citizens to be expressed such as expression and association. However, the legal framework for elections in Kenya does not provide a cap on campaign financing which has the potential to fuel election malpractices such as bribery and vote buying.

Where clarity on the legal framework was needed, EISA observed that the judiciary were able to provide the necessary interpretation of the law especially where stakeholders did not agree. It was noted that stakeholders had general confidence in the judiciary exhibited through their willingness to submit and to comply with its decisions in relation to key electoral processes such as the verification of voters.

EISA noted the reluctance or failure to fully implement some reforms through passing of amendments to the Electoral Act guided by the court leading to delays in the definitive articulation of electoral processes in time for election stakeholders to have a sense of certainty about how some processes would be administered. Additionally, it

was observed that the absence of reforms to the electoral laws contributed to last minute litigation which perpetuated last-minute changes to electoral procedures. Such last-minute changes could have led to varying interpretation of how, for instance, voters would be verified during voting. EISA observed the absence of a common understanding in the interpretation of the court ruling on the use of the manual register.

4. Electoral Management

The Independent Electoral and Boundaries Commission is established under article 88 (1) of the Constitution. The Constitution provides that the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established under the Constitution and any other elections as prescribed by an Act of Parliament (Constitution of Kenya, 2010. Art.88).

The EISA IEOM observed that while the legal framework for election in Kenya provides for the independent administration of electoral processes, the IEBC faced significant trust deficits from citizens and some election stakeholders, particularly because of the annulment of the 2017 elections. Furthermore, it was noted that the commission had operated with a limited number of commissioners for the significant proportion of the pre-election period. EISA also gathered that the body had received support to manage the 2022 elections late. Stakeholders engaged by the observation mission highlighted concerns about the IEBC communication suggesting that its strategy was both conservative and limited.

Regardless of challenges faced by the IEBC in the run up to the 2022 elections, the body was generally observed to have managed to fully comply with legal timelines set to complete key processes. Additionally, it was noted that such successful compliance with legal timelines to conclude electoral processes was accompanied by efforts to be inclusive and transparent. Civil society groups, for example, confirmed having been involved in the procurement of sensitive and election materials.

The Mission also witnessed improved coordination between the IEBC and other state institutions supporting democracy following initial challenges particularly with the security agencies following what was described as an attempt by some foreigners to bring into the country some election materials without sufficiently declaring them.

EISA observers, however, observed improved communication by the IEBC leading up to the election particularly on its electoral preparations and addressing misinformation directed at electoral processes. Even though there were fears that the commission may have not sufficiently communicated with its own polling officials about changes in procedures on the use of the manual register, it was observed that timing of the judgement on the matter gave the body very limited time to adequately communicate with its already trained and deployed polling staff.

The EISA Mission encourages the IEBC to ensure high levels of compliance with legal provisions, independence, professionalism, and transparency in the conduct of remaining electoral processes including transmission, verification, and declaration of results. The IEBC should continue to make full use of the media and call centres that

have been set up at Bomas of Kenya to guarantee the constant flow of information about the electoral process.

5. Voter registration and the voters register

The IEBC carried out Mass voter Registration (MVR) in 2021 and 2022 with a target of registering six million new voters nationwide. Following the MVR, the IEBC managed to register 22,120,458 voters of which 10,400 were in the diaspora namely Tanzania, Uganda, Rwanda, Burundi, South Africa, South Sudan, Germany, United Kingdom, Qatar, United Arab Emirates, Canada, and United States of America. For the Special vote, the IEBC was able to register 7,483 prisoners and persons with disabilities (PWDs) constituting 18.98% of all registered voters.

Voting took place in all the 46,233 gazetted polling stations with each polling station capped at 700 voters only, an increase of 13.08 per cent from 2017 where 40,883 polling stations were set up. The number of registered voters was noted to have increased from 19,611,423 to 22,120,458 equivalent to 12.79%. The registration process conducted by the IEBC was audited by KPMG and the final report was submitted to the Commission on 18th June 2022. The full voters' roll audit report was only released a few days before the elections making it impossible for election stakeholders to independently confirm that the full audit findings had been addressed in the final voters' roll that was used during the voting process.

6. Election Campaign environment

The final days of election campaigning in 9 out of the 10 counties observed by the EISA Mission were characterised by a large degree of peace and calm. The campaign took the form of rallies, public/street meetings and shows. EISA observer teams witnessed a noteworthy level of discipline and mutual respect among political parties, including in instances when competing parties engaged in campaign activities at the same time. Election campaign activities in areas observed proceeded without intimidation and a security presence in 72% of instances observed. Campaign activities benefitted from the professional presence of security forces in 28% of cases observed by EISA observers. The broader election campaign environment was marked by compliance of contesting political parties and independent candidates with the 48-hour long silence period in areas where the EISA Mission observed the final two days of the election campaign. The campaign environment was punctuated by a breach of the electoral code. The Mission is concerned about a few cases of cash handouts observed in Makueni and Nyamira.

Based on the assessment of the period immediately before and during the polling and counting processes, the EISA Mission witnessed a generally peaceful environment particularly during the last two days of campaign rallies, during the 48 hours ahead of the election day and during the opening voting, closing, and counting of votes on election day. In particular, the Mission acknowledges the restraint of all the presidential candidates in generally steering away inciting rhetoric in their final campaigns, religious leaders the National Commission on Integration and Cohesion and civil society for consistently encouraging candidates, parties, and citizens to remain

peaceful and state security agencies for assuring the nation of their preparedness to provide adequate security during the charged electoral process.

While the political environment was generally peaceful, the Mission witnessed and received reports of violence before and during the polling processes. Reports of an attack targeted at a police station allegedly attributed to bandits on polling day raised the risk of insecurity during the elections. In all the incidences brought to the attention of the Mission, adequate measures to contain the situation were deployed by the security agencies. It is unfortunate, however, that one of the incidences of violence resulted in a fatality. The Mission extends its heartfelt condolences to family and friends of the bereaved. A life lost in an electoral process is always one too many. The Mission encourages the law to take its full course for justice to prevail.

7. Civil Society

Public participation rights enshrined in the Constitution provide sound legal basis for civil society's active role in public affairs in Kenya. Civil society has, over the decades, been renowned for its robust engagement in public affairs and elections particularly.

EISA IEOM acknowledges and commends the active participation of Kenyan civil society in the electoral process, particularly in voter education, election observation, advocacy, and peace initiatives to promote a credible election in Kenya. More specifically, the role of citizen observation groups such as ELOG need special mention for their role in exercising independent verification of key electoral processes such as audits of voter registers, the parallel vote tabulation and the setting up of the Election Situation Room which provided a credible source of election information to stakeholders during the electoral process.

8. Participation of women and the youth

Section 81 of the Supreme Law further stipulates that not more than two-thirds of the members of elective public bodies shall be of the same gender. Interlocutors of the EISA IEOM were generally satisfied with the legal framework for women political participation.

However, the High Court in its ruling in the case of Adrian Kamotho Njenga versus the IEBC ordered the suspension of the implementation of the two-thirds gender principle in the nomination of candidates for the 9th of August 2022 General Election.

The EISA IEOM is of the view that the constitutional and legal framework for democratic elections in Kenya is largely conducive for the enjoyment of equal opportunity for women and men. Specific legal provisions related to women's participation are largely in line with Kenya's international and regional obligations and commitments to inclusive electoral processes. The Mission is also of the opinion that the constitutional provision of the two-thirds gender rule is compliant with the African Charter on Democracy, Elections and Governance, which commits State Parties to promoting gender balance and equality in the governance and development processes.

Notwithstanding the gradual increment in female parliamentary representation registered in the last two elections, held against the backdrop of the two-thirds gender principle, the EISA IEOM is of the view that progress has been partly decelerated by the absence of legislation for the effective implementation of the two-thirds gender rule.

The EISA IEOM noted general youth apathy in the electoral process attributed by stakeholders to lack of mobilisation and interest of the youth in these elections arising from unmet expectations and high unemployment levels among the demography.

9. Election Day

On Election Day, the EISA IEOM observed processes in a total of 187 sampled polling stations (74% in urban and 26% in rural areas) in 10 counties in 7 regions, namely Nairobi City, Kiambu, Kitui, Makueni, Nandi, Nakuru, Nyamira, Kakamega, Kwale and Uasin Gishu.

Opening

Ahead of opening of the polls, EISA IEOM observers noted a high number of voters waiting at the entrance of polling stations visited. The Mission observed that vast majority of polling stations visited opened on time, with only few that opened approximately half an hour to an hour late due to poor preparations by polling staff, late arrival of polling clerks, election materials and agents. Election materials were in an adequate and sufficient quantity throughout the day in all the polling stations visited.

The Mission noted with concern that, in certain polling stations visited, authorised persons, including party/candidate agents, citizen observers and international observers did not have access to the polling stations before the stipulated opening time.

The EISA IEOM observed the presence of the security agents that enhanced the largely peaceful environment observed in and around the polling centres visited. At the time of opening the polling environment was free of campaign materials but what appeared to be residual campaign posters were witnessed in the vicinity of certain polling centres visited.

Voting

During the voting stage, the EISA IEOM observed that the secrecy of the vote was guaranteed in almost all the polling stations visited. Most polling stations visited had a large number of party agents present with the majority being female. The visible and professional presence of security officers enhanced the sense of security about the voting process. At the time of opening the polling environment was free of campaign materials but campaign posters were witnessed in the vicinity of certain polling centres visited.

In almost all the stations visited voters were required to present valid identification documents which were verified using the KIEMS kits. The Mission however observed that in some few of stations visited, voters were not allowed to vote due to technical

failure of the voter verification system, being at the wrong station and not providing required identification. The manual voter register was used in instances where the voter verification machines failed to work with approval of the IEBC.

Counting

Counting procedures were in most cases applied although not consistently and in a standard manner. The Mission observed that in some of stations visited, the manual voter register, and unused ballots were placed in tamper proof envelopes. In other stations visited, the presidential election results were electronically transmitted with copy of the results sheet being given to party agents. In another instance the Mission noted that the results were not instantly transmitted because of a dispute on the number of votes cast which did not match the number of counterfoils after verification by the polling personnel.

COVID-19 Protocols

Generally, the Mission noted that COVID-19 protocols were not strictly applied and enforced in polling stations visited.

10. Concluding Remarks

The 2022 general elections were a test of the strength of democratic institutions in Kenya and a test of the commitment of Kenya to competitive, inclusive, peaceful, and transparent elections.

The EISA IEOM acknowledges constructive efforts collectively made by the relevant national election stakeholders in preparation for the 9th of August 2022 elections. The Mission recognises the level of efforts of the Independent Electoral and Boundaries Commission and security agencies in their contribution towards an inclusive and peaceful voting day. The Mission also hails the commitment to democratic consolidation of the relevant election stakeholders and Kenyans who seized the opportunity to vote afforded to them by Kenya's Constitution. Furthermore, the Mission applauds all the Kenyans who took part in exercising their democratic right to vote in a peaceful and disciplined manner.

With the election results transmission and management process still ongoing, the EISA EOM encourages political leaders, their supporters, and Kenyans to remain peaceful throughout the final stages of the process for the sake of community cohabitation, social cohesion, and peace.